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Scoping Issues and Imposing Time Limits by Ontario's Environment Minister at Environmental Assessment Hearings — A History and Case Study

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The creation of new statutory powers for the provincial Minister of Environment to scope issues (i.e. limit the number and range of issues which might be examined) for an environmental assessment matter referred to hearing, and to set a deadline for the tribunal to conduct the hearing and render its decision, was part of the provincial government's efforts to overhaul the EA process. The lengthy history behind the passage in 1996 of these controversial powers through amendments to the Ontario Environmental Assessment Act is reviewed in this article, along with a description and analysis of the experience of those involved in the only two EA hearings (Adams Mine and Quinte Landfill) which have been conducted since that time. Concerns and suggestions arising out of the use of these powers are discussed and highlighted. They touch on fundamental issues such as the purpose of the hearing process, tribunal independence, fairness, political intervention, procedural transparency, exercise of discretion, the purpose of EA planning, and the integrity of the EA process. Although experience with these powers is still rather limited, the article concludes that it is important to begin now to develop constructive recommendations to address the concerns which have been raised.

Les efforts du gouvernement provincial pour mettre à jour le processus des Évaluations environnementales (ÉE) ont mené à la création de nouveaux pouvoirs statutaires pour le ministre provincial de l'Environnement qui lui permettent de déterminer la portée des questions (c.-à-d., de limiter le nombre et la portée des questions qui pourraient être examinées) en matière d'évaluations environnementales soumises à

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des audiences et d'imposer un délai au tribunal pour tenir une audience et rendre une décision. Dans cet article, on examine toutes les circonstances qui ont mené à la promulgation en 1996 de ces pouvoirs controversés grâce à des amendements à la Loi sur les évaluations environnementales de l'Ontario; on y retrouve également une description et une analyse de l'expérience de ceux ayant participé aux deux seules audiences d'Évaluation environnementale (Adams Mine et Quinte Landfill) qui ont eu lieu depuis ce moment-là. On y souligne et discute les inquiétudes et les suggestions soulevées par l'utilisation de ces pouvoirs. Elles ont trait à des questions fondamentales, telles la raison d'être du processus des audiences, l'indépendance des tribunaux, l'équité, l'intervention politique, la transparence des procédures, l'exercice du pouvoir discrétionnaire, le but de la planification des ÉE, ainsi que l'intégrité du processus des ÉE. Bien que l'expérience avec ces pouvoirs soit encore plutôt limitée, cet article conclut qu'il est important de commencer dès maintenant à développer des recommandations constructives pour aborder les préoccupations ayant été soulevées.

1. BACKGROUND

As a result of a major overhaul of the Ontario *Environmental Assessment Act* (EAA)[1] in 1996[2] the Ontario Minister of Environment was empowered to set time limits for environmental assessment (EA) hearings and to "scope" or limit the number and range of issues which the parties would be entitled to raise at the hearing and the hearing board would be able to consider.[3] In Ontario, EA applications are referred by the Minister to the Environmental Assessment Board (EAB), now renamed the Envi-

1 R.S.O. 1990 c. E18.

2 The amendments to the EAA were made pursuant to the *Environmental Assessment and Consultation Improvement Act, 1996*, S.O. 1996 c. 27, referred to also as Bill 76, and came into force at the beginning of 1997. For an excellent critique of the amendments in Bill 76 and the resulting effectiveness of the EAA, see law professor Marcia Valiante, "Evaluating Ontario's Environmental Assessment Reforms" (1999), 8 J.E.L.P. 215.

3 The time limit or deadline power was created by s. 9.1(5):

> The Tribunal shall make its decision by the deadline the Minister specifies or by such later date as the Minister may permit if he or she considers that there is a sufficient reason (which is unusual, urgent or compassionate) for doing so.

Section 9.2(6) is identical but applies to those cases in which the Minister has referred only part of an application to the Tribunal. The issue scoping power was created by s. 9.3(4):

> Despite subsection (2) or (3), if referral of an application or of matters relating to the application is requested but the Minister considers a hearing to be appropriate in respect of only some matters, the Minister shall refer those matters to the Tribunal under section 9.2.

Section 9.2(1) provides:

ronmental Review Tribunal[4] (ERT) for hearing. As will be discussed, the manner and extent to which these powers are exercised can have a very direct and significant affect on the EA process.

Although this article will not address in detail the Minister's new power to approve "terms of reference" (TOR) before an EA study is undertaken,[5] it should be emphasized that an approved TOR will likely have a very significant effect on the Minister's subsequent decision to scope issues when a matter is referred for hearing.

There have only been two applications referred to hearing since the EAA was revised,[6] namely the undertakings involving the Adams Mine Site[7] near the Town of Kirkland Lake, and the Quinte Sanitation Landfill

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The Minister may refer to the Tribunal for hearing and decision a matter that relates to an application.

Finally, with respect to those matters scoped out of the hearing by the Minister, s. 9.2(3) imposes the following requirement:

The Minister shall inform the Tribunal of decisions that the Minister proposes to make on matters not referred to the Tribunal in connection with the application.

4 The Ontario Environmental Assessment Board (EAB) was subsequently merged with the Environmental Appeal Board and recently renamed the Environmental Review Tribunal pursuant to the *Red Tape Reduction Act, 2000*, S.O. 2000 c. 26. In this article the terms EAB, Board, ERT and Tribunal will all be used.

5 Terms of reference are dealt with in the following new provision in the EAA:

6(1) The proponent shall give the Ministry proposed terms of reference governing the preparation of an environmental assessment for the undertaking.

6(2) The proposed terms of reference must,

(a) indicate that the environmental assessment will be prepared in accordance with the requirements set out in subsection 6.1(2);

(b) indicate that the environmental assessment will be prepared in accordance with such requirements as may be prescribed for the type of undertaking the proponent wishes to proceed with; or

(c) set out in detail the requirements for the preparation of the environmental assessment.

6(3) The proposed terms of reference must be accompanied by a description of the consultations by the proponent and the results of the consultations.

(3.1) The proponent shall give notice of the proposed terms of reference and shall do so by the prescribed deadline and in the manner required by the Director.

6(4) The Minister shall approve the proposed terms of reference, with any amendments that he or she considers necessary, if he or she is satisfied that an environmental assessment prepared in accordance with the approved terms of reference will be consistent with the purpose of this Act and with the public interest.

6 In fact the number of cases referred to the EAB has drastically diminished. These two cases have been the only referrals since the current Progressive Conservative government took power in 1995.

7 *Notre Development Corporation, Re*, 28 C.E.L.R. (N.S.) 1, 1998 CarswellOnt 2475 (Ont. Environmental Assess. Bd.)

Site[8] in the City of Quinte West. Both of these cases involved private sector proposals[9] to commence new landfill operations.[10] This article examines the manner in which the Minister exercised his deadline and issue scoping powers in those two cases, and looks briefly at the impact it had on the hearings, the parties, the Tribunal, the decisions and the advancement of the EAA's goal of environmental protection.[11] Section 5 contains a wider review of the influence of these powers, along with a number of suggestions.

In addition to reviewing the two decisions, other material in the EAB's files and some hearing transcripts, I have also canvassed on a confidential basis the experience and opinions of counsel who appeared in both hearings (although not all of them responded to my request for an interview), and others closely connected with these cases. People from all sides were contacted.[12] It should be emphasized that this article is not based on anything resembling a representative opinion survey, and nor has it necessarily attempted to express an impersonal point of view with respect to these matters.[13]

2. DEVELOPMENT OF THE MINISTER'S NEW LEGISLATIVE POWERS

The provincial government and the EAB had been under pressure for many years to improve control over EA hearings so that they are shorter and more focused. Several high-profile hearings in particular lasted for

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8 *Fibre Environmental & Ecology Ltd., Re* (November 27, 1998), Doc. EA-97-02 (Ont. Environmental Assess. Bd.). Subsequent costs applications were decided 31 C.E.L.R. (N.S.) 61, 1999 CarswellOnt 2704 (Ont. Environmental Assess. Bd.).

9 This article does not address the long-standing debate about whether private sector undertakings ought to be subjected to different (and perhaps less rigorous) EA requirements than government projects.

10 In the case of Quinte, the proponent sought to re-open a closed landfill, remediate and mine the old site for valuable wastes, and expand it in order to receive another 10 to 12 million tonnes of waste.

11 The purpose of the EAA, as set out in s. 2, has not been changed. Its goal is "the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment."

12 My thanks to all those who generously agreed to be interviewed and contribute to the development of this article. I have undertaken that I will neither identify them, nor credit any of these sources with the facts, opinions or suggestions provided to me.

13 While I had no role in the Adams Mine or Quinte proceedings, my direct experience with EAB hearings in general, and EAA landfill matters in particular, has very significantly influenced my perceptions of the issues surrounding ministerial scoping and deadlines. This is reflected to some degree in the distillation of concerns and responses, expressed by others, which is found in this article.

years and consumed tens of millions of dollars. Criticism over the length and cost of hearings has come from all quarters (provincial and municipal politicians, government administrators, private sector proponents, community groups and environmentalists). For example, a report on the experience and views of "citizens and their lawyers" maintained that "long hearings are not seen as the ideal way to resolve conflicts, or make environmental policy."[14] It also states:

> Nevertheless, all participants in the long hearings, as well as other critics, agree that shorter processes are desirable. The situation has become serious enough that if reforms are not instituted to reduce the length of hearings, many believe that eventually the Legislature itself could turn against the Act.[15]

In 1988 the government commenced the Environmental Assessment Program Improvement Project (EAPIP) to examine growing concerns about whether the EA process was sufficiently effective, fair and efficient. The following passage is from a 1990 report of the EAPIP Task Force:[16]

> The hearing process, however, by reason of its complexity, duration, and costs needs to be revised. Many submissions received during the course of the review identified problems with the length of time, cost, and format of hearings held under the EA and CH[17] Acts. Some have found the formal and adversarial atmosphere of hearings intimidating and a deterrent to meaningful citizen participation.[18] . . .
>
> It is the opinion of the Board and many others that failure to effectively scope and resolve issues during pre-submission consultation and prior to commencement of a hearing contributes substantially to the length of hearings. Scoping during the proposed PAC[19] should help focus the planning studies and public

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14 *Mega-EA Hearings: Thoughts from the front*, Canadian Environmental Law Association, July 1993, at 13.

15 Ibid. at 2.

16 *Toward Improving the Environmental Assessment Program in Ontario*, Ministry of Environment (68 pages), December 1990.

17 *Consolidated Hearings Act*, R.S.O. 1990 c. C.29.

18 The following comments on this issue are from a written submission made by the former EA Branch Director, Derek Doyle, during the EAB's procedural reform process in 1990:

> There is a view that the adversarial approach has not led to shorter, fairer and more efficient hearings. Indeed, some have expressed to me a contrary view. . . . The process of democratization brought decision-making to the public, now it is threatened of being lost again in the adversarial process.
>
> There are incentives for experts, consultants and lawyers to protract hearings. Yet the people they serve: the public, the proponent and the decision makers almost stand by as observers with limited control.

19 "Planning and Consultation" was defined in the report's glossary as: "The first stage of the EA process prior to formal submission of an EA document where the proponent carries out studies and public consultation required to conduct an assessment of alternatives, select a preferred alternative and prepare an EA document."

> consultations on key issues and concerns. This in turn will facilitate resolution of issues to the greatest extent possible and concentrate efforts on the major or outstanding concerns in the EA document. In addition to the recommendation giving the Minister scoping powers,[20] it is recommended that such a provision be introduced for the Board. Scoping decisions should form the basis for the Board to scope the approval hearing. In this regard, it is recommended that any scoping decision made during PAC be binding on the Board at any subsequent hearing, with the proviso that the Board be able to entertain any new evidence of a significant nature that would require variation from the original scoping decision. Issue resolution during the PAC and Review and Acceptance phases should also enable the Board to further scope the hearing.
>
> An area where the Board has introduced scoping is in the identification of issues and presentation of evidence during a hearing. There is a growing tendency among proponents to present extensive evidence in chief to cover every aspect of their cases. Parties respond in kind with extensive cross-examination and evidence of their own. The introduction of formal scoping procedures in the Board's Rules of Practice and Procedure would assist the parties and the Board in focusing evidence on key issues and enable hearing time to be used more effectively.[21]

The report acknowledged "various other procedural measures" adopted by the EAB "to improve the efficiency and expedite hearings without limiting the involvement of participants" and observed that in light of "the increasingly complex and time consuming nature of hearings the Board should have full legislative support and authority to implement any procedural improvements it considers necessary."[22]

In 1990 the Environmental Assessment Advisory Committee (EAAC)[23] was instructed by the Environment Minister to conduct a public consultation and provide advice on how to improve the EA process. The Committee's far-ranging report[24] acknowledged the importance of envi-

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20 Recommendation 4.5 of the report calls for amending the EAA "to provide that the Minister be given the authority to scope the issues and areas to be considered by the Board when referring an undertaking for a hearing on approval" (at 33).

21 Ibid. at 33-34. Recommendation 4.9 of the report proposed that the EAA be amended to "provide authority for the EA Board to convene scoping hearings during PAC and to scope the issues and areas to be addressed in an approval hearing" (at 36).

22 Ibid. at 35.

23 EAAC, an advisory body with a long and effective history, was "established in 1983 to provide for public input and independent advice to the Minister on the application of the [EAA] and other EA-related matters" (from the preface of EAAC Report no. 47, *Reforms to the Environmental Assessment Program*, 1991-1992). EAAC was eliminated in 1996.

24 *Reforms to the Environmental Assessment Program*, EAAC Report No.47 (200 pages), Part 1 (October 31, 1991) and Part 2 (January 27, 1992).

ronmental assessment[25] but also identified the need for administrative and legislative changes:

> Significant improvements can be made immediately through administrative changes and a fundamental change in commitment to the EA program by government. Such changes are absolutely necessary for the program to work. These alone, however, are not enough to address current weaknesses of the process and its implementation. It was evident from the submissions that both proponents and the public see the need for legislative changes to address their concerns.[26]

EAAC concluded that concerns about EAB hearings were valid and needed to be addressed:

> A major criticism of the EA process relates to EA Board hearings — their length, their cost, and their adversarial, formal and intimidating nature. It is imperative that the Board exercise considerably greater control over hearings and that changes be made to the hearing procedures to reduce their length by setting time limits, scoping the issues, using alternative dispute resolution methods, and implementing case management. In addition, the Board should adopt a more investigative role and make its proceedings less intimidating to the public. Finally, the Act needs to be amended in order to ensure that the Board has the clear legal authority to carry out its responsibilities more efficiently.[27]

With respect to time limits, the report included the following observations:

> The Committee believes that, except for the approval decision by the Minister or Board, it is both possible and necessary to require time frames legislatively as long as there are reasonable default options when deadlines cannot legitimately be met. . . . The intention is to ensure timely environmental decision making. . . .
>
> Legislated time limits cannot however be imposed on either the Minister or the EA Board for the final approval decision. In her covering letter to the Discussion Paper,[28] the Minister asked that the establishment of timeframes for EA Board hearings be considered. Constraining the Board in this way, however, is not feasible since the hearing process must meet the tests of natural justice and

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25 Since it was proclaimed in 1976, the *Environmental Assessment Act* has been an important vehicle for improved environmental decision making in Ontario. The principles of the EA Act are still sound — evaluation of potential environmental effects, consideration of alternatives, broad definition of the environment, documentation of the assessment, public and government consultation and review, and where warranted, review by an independent tribunal. The EA program has helped to broaden the way we approach environmental problems. In today's world it is no longer acceptable for decisions affecting the environment to be made without first critically and publicly considering alternatives and the full range of effects on the environment (ibid. Summary at 1)

26 Ibid. at 2 of Summary.

27 Ibid. at 5.

28 Ibid. at 16.

> fairness. Instead, it is possible, and the Board is taking some steps, to make the internal workings of the hearings more efficient.[29]

EAAC did encourage the Board to impose hearing time limits:

> However, the Board should attempt to establish time limits on each hearing as a whole on a case by case basis, and on parts of each hearing. Some time limits for parts of hearings might be established as general rules for all hearings; others may need to be set on a case by case basis. The Board should be given clear statutory authority to set, on a case by case basis, time limits on parts of hearings, and if possible on whole hearings.[30]

With respect to the scoping of issues to be aired at hearings, EAAC's report contained the following comments:

> To save additional unnecessary hearing time, the [EAPIP] Task Force recommended that the EA Board have the authority "to scope the issues and areas to be addressed in an approval hearing." Some submitters stated that the parties to a hearing should be allowed to present fully their cases in the way that they deem best, and that therefore the Board should not be allowed to scope the hearing without the consent of all parties. The Committee believes, however, that since the Board has the responsibility for the approval decision, it is best able, and should be allowed, to determine what issues and areas it needs to hear to make an informed and wise decision. The Committee is also convinced that the Board will be sensitive to arguments by the parties during discussions on scoping. The Board should, however, be obligated to hear representations from the parties before making a scoping ruling.[31]

As will be discussed later, the issue of providing reasons for decisions is relevant and important with respect to deadlines and issue scoping. EAAC recommended that revisions to the Act "require that all decisions of the Minister, Board and Director are accompanied by written reasons."[32] Its reasons for this position are expressed in the following excerpt from the report:

> In order to ensure accountability to the public and proponents, all decisions, including decisions on hearing requests, should be accompanied by written reasons. Providing reasons will also assist participants in future EAs to understand EA requirements.[33]

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29 *Supra* note 16, 1990 EAPIP report.

30 Ibid. at 81-82. Recommendation #25 includes the following statement: "The EA Board should implement measures to make its hearing process more efficient. This should include the setting of time limits for hearings and parts of hearings . . ." (at 84).

31 Ibid. at 82. Recommendation #25 also states that efficiency measures to be implemented by the EAB should include "scoping of issues and areas to be addressed in the hearing" (at 84).

32 Ibid. at Recommendation #14, at 68.

33 Ibid. at 68.

The provincial government's response[34] to EAAC's report adopted administrative changes but not legislative reform. It articulated hearing reform goals[35] and listed the various initiatives undertaken by the EAB to achieve these goals, such as "eliciting, at preliminary hearings, good estimates of hearing time required and holding hearing parties to those estimates" and "using preliminary hearings to clearly define issues in contention so that evidence and argument can be confined to those issues."[36] It did not discuss the imposition of issue scoping or time limits. With respect to providing reasons for decisions, the response states that "information considered and the reasons for decisions made by the Minister will be provided to improve the openness and fairness of the process."[37]

The Board continued to expand its efforts to control the length of hearings in EAA cases as well as in other matters.[38] For example, in some cases it established general caps on time spent examining witnesses.[39] In the *West Northumberland Area Landfill, Re* hearing[40] the hearing panel commented at the opening of the first day of preliminary hearings[41] that the eight previous EAA landfill hearings had lasted from 59 to 269 hearing days, with the average being 103 days (excluding the two longest hearings from the average). The joint board indicated that it would attempt to contain the length of the main hearing to 30 days or less. After further

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34 *Environmental Assessment Reform — A Report on Improvements in Program Administration*, Ministry of Environment and Energy, July 1993.

35 The three stated goals were the reduction of average length of hearing process from 20 to 10 months, reduction of average hearing length from 12 to six months, and the rendering of decisions within 90 days of the end of hearings (ibid. at 17 of report).

36 Ibid. at 17.

37 Ibid. at 18.

38 In *ICI Canada Inc.* (file CH-95-02), a proceeding involving the *Ontario Water Resources Act* (OWRA), the joint board refused to proceed to the main hearing with an unfocused issues list and a time estimate of 20 hearing days from the parties; in the pre-hearing process the panel set a preliminary objective of five hearing days. Three days of preliminary hearings were consequently held, in addition to two facilitation sessions conducted by EAB staff and non-panel EAB members. Before the main hearing commenced in the Spring of 1996, the panel had secured the parties' agreement to six hearing days, inclusive of a site visit and a day of final submissions. The breakdown of time for each day during the schedule, and allocation of time among the parties, was pre-arranged by agreement. The schedule was adhered to and the hearing finished on time.

39 The 30/90 model would allow up to 30 minutes for direct examination and 90 minutes for cross-examination, and precludes "multiple" (more than one cross-examination on the same issue) or "friendly" (cross-examination by parties not opposed in interest) cross-examinations.

40 A joint board hearing (file CH-94-02) involving an environmental assessment under the EAA of a proposed new landfill.

41 (September 13, 1994), Doc. CH-94-02(F) (Ont. Joint Bd.)

preliminary proceedings, the panel conducted a Phase 1 preview hearing lasting two days, in which it examined a lengthy list of issues which the parties had previously identified as potentially problematic for the success of the proponent at a full hearing. The joint board reviewed documentary evidence (much of it in affidavit form) which the parties pre-filed, heard oral submissions, and then issued rulings which led to an early withdrawal of the proponent's application.[42]

In the first substantial revision to its procedural rules undertaken in many years, which was released in April 1996, the Board included specific provisions regarding scoping of issues,[43] time limits on hearing length[44] and time limits on oral evidence.[45] In its scoping exercises, the Board in some cases had already begun to ask parties to provide more information to explain and defend issues they sought to raise at the hearing. They were directed to submit the following type of information:

- a specific and concise description of the problem;

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42 This was the last EAA hearing to conclude before the Adams Mine and Quinte applications were referred to the Board at the end of 1997.

43 Rule 5.1(1)(b) of the EAB's *Rules of Procedure* (1996) provided that one of the purposes of the preliminary hearing is "identifying, defining and scoping issues." Rule 5.11(2) stated that pre-hearing conferences could be conducted to deal with any matter including:

> (a) the scope of parties' participation in the hearing;
> (b) simplification or settlement of issues;
> (c) establishing facts or evidence that may be agreed on; . . .
> (f) other matters that may assist in the just and most expeditious disposition of the proceeding.

44 Rule 7.14: "After considering any submissions from the parties, the Board may set limits, in advance of or during a hearing, governing the length of the hearing and the time required for each component of the hearing, including opening and closing submissions, examinations (including direct evidence, cross-examination and re-examination) of witnesses and site visits."

45 Rule 10.4 contained provisions such as limits on friendly and multiple cross-examinations, which were, to the knowledge of the Board, without precedent elsewhere in rules of practice in courts or tribunals in Ontario:

> (1) No oral evidence shall be introduced concerning issues that have been resolved or conditions of approval upon which agreement has been reached, unless the Board orders otherwise. The Board may receive and act on any agreed facts and opinions without proof or evidence.
> (2) If a witness statement has been produced, direct examination of the witness, if any, shall be limited to a review of the most important points in the witness statement.
> (3) After considering any submissions from the parties, the board may provide time limits on direct evidence, cross-examination and re-examination, and restrict or prohibit "friendly" cross-examination (cross-examination by a party unopposed to the interests of the party calling a witness) and multiple cross-examinations (cross-examination covering an area already dealt with in a previous cross-examination of the same witness by a different party).

- whether it is a substantial concern which must be dealt with by calling evidence at the hearing, in addition to the filing of documentation;
- how the problem can be corrected or avoided (if applicable);
- what steps should be taken to deal with the problem;
- how the issue is related to the decision(s) the board must make at the end of the hearing.[46]

When Bill 76, containing amendments to the EAA, was introduced in June 1996[47] the issue scoping[48] and deadline powers generated debate in the Legislature and elsewhere.[49] A brief from the Canadian Environmental Law Association to the legislative committee reviewing the pro-

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46 From procedural directions issued by the Board in a memorandum to the parties on July 21, 1995 in *ICI Canada Inc.* (*supra* note 38).

47 During her introductory remarks about Bill 76 on June 13, 1996 the Environment Minister, Brenda Elliott, stated:

> A full environmental assessment will still be required and the key elements of the environmental assessment are maintained, including the broad definition of the environment, the examination of alternatives, the role of the Environmental Assessment Board as an independent decision-maker.
>
> These amendments will ensure high-quality environmental protection while making it easier for people to participate in the decision-making process. (Hansard at 3529)

The following excerpt is from an information bulletin regarding the amendments, issued at the same time by the Ministry:

> During 20 years of experience with the environmental assessment process, a number of issues have arisen on a consistent basis. The primary problems with the current process, particularly as it applies to individual EAs for projects like waste disposal sites, are threefold: it can take too long, it can cost too much, and the results can be unpredictable.

48 Bill 76 initially allowed for an EAB panel to request the Minister to change her scoping order. The following provisions contained in the Act when it was introduced, were changed before 3rd reading:

> 9(3) The Minister may direct the Board to hear testimony concerning only those matters that the Minister specifies, and the Board shall do so. The Minister may amend a direction to the Board at the Board's request or on the Minister's initiative.
>
> (4) A direction by the Minister does not preclude the Board from hearing argument by the parties on any issue relating to the application.

49 The *Staff Report Prepared for the Environmental Commissioner of Ontario* (August 2000) notes the concern raised by that agency, in the context of the *Environmental Bill of Rights, 1993*, about the lack of public consultation in general surrounding Bill 76:

> In our 1996 annual report and other publications, the [Environmental Commissioner of Ontario] noted that this initiative on Environmental Assessment reform should have been subject to the type of expanded consultation on new laws that most members of the public in Ontario expect. These consultations typically involve the release of a discussion paper outlining policy options. Feedback from concerned stakeholders often is then incorporated into the final proposals for a new law. These steps were not followed in the case of Bill 76 (at 12).

posed amendments observed that these new powers would allow "th Minister to greatly constrain the scope of EA hearings by dictating th length of the hearing, and by directing what testimony and matters can b heard by the Board."[50] It pointed to recently revised EAB rules of practic which significantly enhanced "the Board's ability to: scope, narrow o settle issues in dispute; limit hearing length; limit evidence-in-chief; anc limit cross-examination," and it recommended that these proposed new ministerial powers be deleted "in order to maintain the independence and integrity of the EA hearing."[51]

The Canadian Institute for Environmental Law and Policy (CIELAP) submitted a brief[52] which, among other things, also objected to the grant of these powers to the Minister.[53] With respect to ministerial scoping, it observed:

> The concept of the Minister limiting the scope of Board hearings raises serious issues of procedural fairness. It seems likely to invite applications for judicial reviews of Board decisions on the basis that the Board was prevented by a ministerial direction from hearing critical evidence.[54]

Similar concerns were expressed with respect to the deadline power. The brief warned that the Board could be "prevented from fully hearing and interpreting critical evidence due to the limited time provided by the Minister."[55]

Submissions on behalf of two coalitions[56] before the Standing Com-

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50 *Submissions of the Canadian Environmental Law Association to the Standing Committee on Social Development re Bill 76*, July 1996, at 31.

51 Ibid. at 32.

52 *Brief to the Standing Committee on Social Development Re: Bill 76*, August 1996.

53 Two of CIELAP's general concerns about the Bill are described below:

> [T]he scope of the environmental assessment process would be significantly narrowed. Indeed, the process could cease to be an environmental planning process. Rather, there would be a focus on the review of the immediate and direct environmental impacts of proposed undertakings. Issues related to the need for undertakings, and the availability of less environmentally harmful alternatives, seem likely to be removed from the process.
>
> Furthermore, the Bill would grant the Minister of Environment and Energy a great deal of discretion over the application of the environmental assessment process, the content and scope of environmental assessments, the granting of public hearings regarding undertakings, and the content of such hearings if granted. This raises the possibility of less consistency in the application of the Act and in the treatment of individual undertakings than is currently the case. (ibid. at 1)

54 Ibid. at 8. The warning about judicial review came to pass in the Adams Mine case.

55 Ibid. at 9.

56 The first group, Citizens Network on Waste Management, is a "loose network of citizens' groups across the province who have been working for years on waste issues" (Hansard, August 12, 1996 at S-679-680). The second, Great Lakes United, is a "coalition of

mittee on Social Development were critical of some aspects of Bill 76[57] and maintained that issue scoping by the Minister could result in the hearing being "much less significant and a much less serious canvassing of the issues."[58] Instead, scoping by the Board in conjunction with the parties was proposed.[59]

On the other hand, the executive director of the Ontario Waste Management Association "told the committee that if the proposed bill were not amended to give the minister more authority to limit the scope of environmental hearings, private waste operators would not apply to create new landfills and the effect would be to chase waste disposal to the United States."[60]

When third reading of Bill 76 was debated in the Legislature[61] opposition members expressed, among other things, the following concerns:

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citizens' groups, environmental groups and labour groups from Canada, the U.S. and the First Nations." Their spokesperson was John Jackson, an environmentalist, consultant and former member of the Ontario Environmental Appeal Board.

57 One concern raised by other critics as well, though not directly relevant to this article, is that the initial scoping out of issues by the terms of reference approved by the Minister, could result in the need for and alternatives to the undertaking never being canvassed: "that could be scoped out right at the beginning stages, before any discussion begins, before any studies are carried out" (at S-680). Mr. Jackson went on to state that these basic EA issues could, of course, also be scoped out of a Board hearing by the Minister. Another issue he focused on was increasing Ministerial discretion:

> I'm seeing more discretion coming to the Minister and the civil service through this proposed legislation. I'm seeing a weakening public role, with funding gone to help citizens' groups to play a serious role in the job . . . .
>
> The overall effect that I fear we are going to have from this in terms of waste management decision-making is less predictability, not more, and secondly, more conflict and more confrontation, because as people lose the confidence and the ability to use the environmental assessment planning process to achieve the goals that we all share, they'll then start looking for other avenues to try to deal with it, either trying to block things through the courts if they can afford it or through demonstrations or whatever. I know none of us want to go in that direction. (ibid. at S-682)

58 Ibid. at S-680.

59 Mr. Jackson, at S-681 of Hansard:

> However, again, there needs to be a public process of the scoping of what the topics of the hearing will be, rather than it simply happening in the Minister's office or in some bureaucrat's office. Again, I think the Environmental Assessment Board is beginning to set up processes to scope hearings before they begin, and I think that's working well. It's only starting. But I think that's the way you scope: where all the parties are sitting at the table and say, "Yes, let's take these topics off the table; let's limit the amount of time we spend on this topic." That makes a hearing much more efficient and work much better.

60 Terry Taylor quoted in an article by James Rusk, *Globe & Mail* newspaper, August 8, 1996.

61 October 31 and November 4, 1996.

- the Minister would have sole discretion over "designating which issues can be sent to the [EAB], and the time allotment for board review";[62]
- the amendments would remove far too many powers from the EAB and grant "the minister sweeping discretionary powers over environmentally significant projects";[63]
- the power to approve terms of reference, along with the issue scoping power, can be used to influence whether an undertaking is approved;
- the deadline power over the EAB, together with the substantial elimination of Ministry staff, will result in "very shoddy decisions."[64]

Government members, on the other hand, emphasized the streamlining function of the amendments.[65]

Within days of passage, the Director of the Environmental Assessment Branch of the Ministry[66] informed lawyers that only outstanding contentious issues would be sent to the Board for hearing.[67] This view

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62 MPP Jim Bradley on October 31, 1996. He indicated that under the Act before Bill 76 new issues could be "raised by the public at any time during the current EA process" due to the fact that "sometimes people don't think of a situation or a problem until well into the process."

63 Ibid.

64 Mr. Gilles Bisson in Hansard on November 4, 1996.

65 MPP Ted Arnott in Hansard on November 4, 1996:

> I want to say most emphatically that the implementation of this legislation will be shaped by one overriding principle: the need to protect the environment. That's the reason for the *Environmental Assessment Act* and for the reforms that we're proposing. . . . If hearings are required, the minister will be able to focus the discussion on specific outstanding issues. This should prevent delays due to endless rehashing of issues which may have already seen some level of resolution. The board's time will be used to facilitate decision-making only with regard to truly significant matters.

He also stated that the new amendments would require "written reasons for most decisions by the minister." MPP Doug Galt, Parliamentary Secretary to the Environment Minister, stated:

> Strict time frames will be adhered to for all key steps in the decision-making process. A full environmental assessment will still be required, and the key elements of environmental assessment are maintained, including the broad definition of environment, the examination of alternatives and the Environmental Assessment Board as an independent decision-maker.

66 The Environmental Assessment Branch and the Approvals Branch have since been merged into one department. For simplicity this article will refer to the EA Branch even where it might be identifying the EA work of the combined department.

67 Chuck Pautler, speaking on November 7, 1996 at a meeting of the Environmental Section of the Canadian Bar Association, Ontario Branch.

was echoed by a Ministry bulletin published shortly thereafter.[68] The EAB's advisory committee[69] promptly developed a recommendation to ensure consultation with Board and parties before hearing directions are given by the Minister with respect to time limits. It was considered important for potential parties to have some input into a decision concerning how long the hearing will take. The challenge was to find a way to allow the Minister to maintain control over the time frames for decision-making, but also provide her with better information upon which to make that decision.

It proposed a two-stage referral process in which the Minister could require the Board to determine, probably at a preliminary hearing, the granting of party status, the issues of concern requiring adjudication, the evidence to be provided, and the time frames required, and to report back within a specified period with recommendations. This approach would permit the Board to give informed advice and suggest deadlines considered to be achievable. In the committee's view the process would be fairer and more transparent, the Minister's decision less arbitrary, and the Board's independence and neutrality more apparent.

Alternatively, in cases where the issues are quite clear, there is unlikely to be any need for a preliminary hearing and no new parties will be involved, the EAB advisory committee proposed that the EA Branch could consult directly with the parties about the time frames required for hearing. Although this approach would not have the same advantages as the Board consulting with the parties, it might save time after the hearing referral has been made.

The approach which the Minister would take was subsequently revealed when two EA matters, the first since the EAA was revised, were referred to the Board for hearing.

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68 From "In Brief," January 1997:

> The public's right to request a hearing remains an integral part of the Act. No one wants unnecessary or lengthy hearings. When a hearing is in the public interest, the Act allows the Minister to focus the hearing to outstanding, environmentally contentious issues only and to set a timeframe for the Board to report its decision.
>
> If hearings are required, concentrating on specific outstanding issues only will prevent the rehashing of issues which have already been resolved. The Minister's power to scope issues will reduce the time and money spent on hearings. Post-hearing cost awards will continue to be available where the EA Board considers them warranted.

69 This committee consisted of a few EAB members and staff, private and public sector environmental lawyers (from the provincial and municipal level), consultants, an environmentalist, a community organizer and a First Nations representative.