Resources

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ONTARIO'S TIMBER MANAGEMENT CLASS ENVIRONMENTAL ASSESSMENT: TWO PERSPECTIVES

FIRST PERSPECTIVE

*by Paul Cassidy**

Introduction

It seems incredible that a hearing could last so long.

The Timber EA took almost six years from start to finish. It was easily the longest, most extensive environmental assessment hearing in history. It heard from more witnesses than any other hearing. It dealt with an issue - forest practices - that moved increasingly into the public eye over the course of the hearing, and its outcome will, hopefully, serve as a focal point for rational debate on such matters as clearcutting, the use of herbicides, and regeneration in the years to come.

First, some statistics. The Ontario Environmental Assessment Board panel commenced its hearing into forest practices in the province in the spring of 1988 and heard four hundred and eleven days of evidence.

This generated more than seventy thousand pages of transcript. The Board received well over two thousand three hundred exhibits. They heard from five hundred and fifty two witnesses, including hundreds of members of the public, as well as most of the leading forestry experts in North America. This was not a superficial look at forestry.

And, contrary to reports by some commentators, the Board was not reviewing forestry practices from an earlier era. The Board heard up-to-date evidence almost until the conclusion of the formal hearings in late 1992. Moreover, the onus was on Ontario's forest products industry and the provincial government (represented by the Ministry of Natural Resources- "MNR") to demonstrate that their timber management and practices met the test of being environmentally appropriate under Ontario's *Environmental Assessment Act*. There was no presumption that those practices were sound.

The Board's decision is *not* a royal commission report. Unlike most environmental assessment boards in Canada, decisions of the Ontario EA Board have legal effect unless the provincial cabinet takes an act of political will to overrule them within twenty eight days of the date of the decision. Therefore, on May 18, 1994, the Timber EA became a legally binding code of forest practices for Ontario. Other provinces, such as British Columbia, have recently introduced Forest Practices Codes but such codes have not undergone formal environmental assessment reviews. The Timber EA decision, therefore, has pushed Ontario to the forefront of forest management practices in this country.

The Participants

When it started hearing evidence in 1988, the Board initially consisted of three members. However, approximately one third of

Résumé

En Ontario, la décision de la Commission des évaluations environnementales sur l'évaluation de catégorie de la gestion du bois de la Couronne offre un ensemble de règles et de critères ayant force de loi eu égard aux opérations de récolte du bois dans la province. Après avoir entendu en audience plus de cinq cent experts et témoins ordinaires, la Commission a conclu, notamment, qu'il est opportun d'utiliser la coupe à blanc et les phytocides chimiques comme outils de gestion forestière. La décision de la Commission est l'examen le plus détaillé des pratiques forestières qui ait jamais été effectué au Canada, et le seul réalisé selon les principes de l'évaluation environnementale.

the way through the hearing, the original Board Chair left the hearing and resumed his private law practice. The two remaining members carried on to the end of the hearing. One of the members was a former environmental planner, and the other had previously been an NDP member of the Ontario Legislature for twenty years.

Over fifty parties were granted standing to appear before the Board but, in reality, five groups played major roles throughout the hearing. These were: the MNR, the Ontario Forest Industries Association (OFIA), Forests For Tomorrow ("FFT"), The Ontario Federation of Anglers and Hunters ("OFAH") and the Ontario Ministry of Environment and Energy ("MOEE"). The MNR and OFIA were allied in interest on most issues at the hearing, and it was their onus to obtain the Board's approval for their forest practices and overall management of the province's timber resources.

FFT was a coalition of organizations, including the Sierra Club, the Federation of Ontario Naturalists and the Wildlands League, and acted as the main environmental group at the hearings. FFT was opposed to the MNR and the OFIA. The OFAH, a provincial umbrella group of the sportsmen's associations in the province, was also opposed to the government/industry position. The MOEE was officially neutral at the hearing. Finally, native groups and provincial tourist outfitter organizations also played significant roles at various segments in the hearing.

While the hearing was dominated by these major parties, a voluminous amount of evidence was also provided by interested members of the public at fifteen satellite hearings held all over the province. Any person or group interested in forestry in Ontario had ample opportunity to be heard by the Board.

The Issues Before the Board

The Board was asked to rule on the propriety of timber management planning and practices of the MNR, the member companies of the OFIA and the Ontario Lumber Manufacturers Association relating to logging on Crown lands in the province (which constitute the vast majority of Ontario's forests). However, logging was not considered in isolation at the hearing. The timber planning process, the building of logging roads, timber harvesting, the regeneration and maintenance of the forest after logging, wildlife impacts, socioeconomic matters, and native concerns affected by logging practices were all issues dealt with extensively through expert and lay evidence. These major issues were frequently debated in detailed evidence in the context of specific topics, such as clearcutting and herbicides use, and of more general issues such as sustainable forestry, and the validity of intensive silviculture.

The Board's Conclusions

After hearing all of this evidence and taking numerous field trips to view the forest for itself, the Board reached the general conclusion that, contrary to perceptions, the forests of Ontario are being managed on a sustainable basis.

Clearcutting is probably the most controversial logging activity practiced in Canada at the present time. However, the Board ruled that clearcutting *is* environmentally acceptable. Moreover, the Board said that limiting clearcuts to small sizes would make it impossible to regenerate Ontario's boreal forest region to its natural pattern of large even age stands (Canada's forest landscape is dominated by the boreal forest type). Therefore, their ruling on clearcutting is not based on the fact that it is a more cost effective, or a safer, way to log. Rather, the Board determined that clearcutting is silviculturally sound for appropriate forest types and sites.

The Board's ruling counters the perception that large scale clearcutting is harmful to the environment. The Board noted that media reports on clearcuts discussed during the hearing served only to misinform an already nervous public about the state of parts of Ontario's forests.

For example, a witness suggested in his evidence that he had used satellite photos to discover a huge clearcut, described as half the size of Prince Edward Island, somewhere near Kapuskasing, Ontario. Major newspapers in Canada and the United States ran front page lead articles on this evidence. However, in our cross examination of the witness, and in response to questions from the Board itself, the witness testified that some of the clearcut forest stands had been cut forty to fifty years ago and were now healthy stands of regenerated timber.

The Board accepted the evidence of the OFIA and the MNR that foresters should be able to utilize a clearcut size appropriate to the forest type and site under management, with the requirement that they provide extra documentation of their reasons for exceeding two hundred and sixty hectares for any one clearcut.

The Board made its clearcutting ruling after hearing from most of the top experts in the field of forestry and wildlife in North America. For example, they heard evidence from the Deans of two of Canada's most distinguished university forestry faculties. They heard the evidence of the chief forester of the United States Forest Service involved in the Spotted Owl dispute and they heard the evidence of the leading expert on bio-diversity in the United States. And they heard the evidence of widely respected forest scientists from the Canadian Forest Service.

The controversy surrounding clearcutting was not the only contentious issue presented during the hearings. The Board also heard months of evidence about the use of chemical herbicides and concluded that they are an appropriate tool for forest managers to use in the development of regenerating forests. The Board also supported the need to study and develop effective management alternatives.

In another ruling, the Board ruled that government and industry foresters should be able to rely on both artificial and natural forest regeneration methods. The Board had been asked to order foresters to deemphasize such intensive silvicultural methods as tree planting and seeding and to rely more on small cuts and naturally occurring regeneration. The Board rejected this approach and agreed with the position of the MNR, supported by the OFIA, that foresters should be able to design management techniques appropriate to the forests they are managing including both artificial and natural regeneration techniques.

Reliance on natural regeneration methods has sometimes been called, rightly or wrongly, "sustainable forestry" or "new forestry". After years of evidence on this issue, the Board rejected it as a viable management technique for Ontario's forests. It is interesting to note that the Timber EA hearings began in 1988 with the argument apparently being made that the industry was not planting enough trees, and it ended in 1992 with suggestion that there is too much dependence on tree planting and other intensive management systems.

The Board came to many of these conclusions based on its finding that the foresters and other scientists who gave evidence on behalf of the government and the OFIA possess a high degree of professionalism and commitment to sound environmental principles.

Conclusion

It is rare for an entire industry and government department to have their fundamental management techniques subjected to such an intensive environmental assessment review. Ontario's forest industry met that challenge in the Timber EA. We now have a decision from an Environmental Assessment Board that was based on the evidence provided by professional foresters and research scientists. This ruling should provide the public with the confidence that government and the forest industry have and will continue to manage the forest in an environmentally friendly and sustainable fashion while accommodating changing social values and contributing to the economic well being of all Ontarians.

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SECOND PERSPECTIVE

*by Rick Lindgren**

On April 20, 1994, Ontario's Environmental Assessment Board ("the Board") released its long-awaited decision on the Timber Management Class Environmental Assessment submitted by the Ministry of Natural Resources ("MNR"). The 560 page document grants the MNR approval to proceed with its timber management undertaking, subject to approximately 115 conditions which govern how timber management activities (i.e. access, harvest, renewal and maintenance) are to be planned and implemented in Ontario's Crown forests for the next decade.

Given the intensive and protracted nature of the hearing, one might reasonably expect that the Board decision would contain progressive and comprehensive conditions of approval respecting forest sustainability, biodiversity conservation, and ecosystem management. However, from the perspective of Ontario's leading conservation groups (who participated in the hearing as the Forest for Tomorrow ("FFT") coalition), the Board decision does little more than entrench the status quo. In particular, the members of the FFT coalition believe that the decision fails to ensure long-term wood supply, ecosystem sustainability, community stability, and protection of non-timber values.

The purpose of this article is to provide an environmental perspective on the Board's decision respecting four key issues: wood supply; clearcut size; old growth; and integrated forest management.

Wood Supply

Ontario's *Crown Timber Act* defines sustained yield as "a continuous approximate balance between growth of timber and timber cut." Interestingly, the Board decision suggests that the MNR is presently practising sustained yield management through its area-based approach for determining harvest levels. This finding was made despite the MNR's own data which clearly demonstrated significant wood supply shortages and stands conversions (i.e. decrease in commercial species and increase in mixedwoods/hardwoods) in management units across Ontario.

Résumé

En Ontario, les groupes de conservation sont dans l'ensemble déçus par la décision de la Commission des évaluations environnementales sur la gestion du bois. Bien que cette décision améliore le processus de planification de la gestion du bois, les groupes de conservation s'inquiètent de la teneur de cette décision dans quatre domaines: l'approvisionnement en bois, la superficie des coupes à blanc, les peuplements mûrs et l'aménagement intégré de la forêt.

This data has been confirmed and amplified by various reports and studies released after the hearing ended. For example, the report of the Ontario Independent Forest Audit found an alarming decrease in black spruce in the province's boreal forest as a result of timber management. Unfortunately, the Board declined to consider the results of the independent audit, and the Board's conditions of approval fail to limit harvest rates to long-term sustainable levels. Without limiting harvest to sustainable levels, accelerated wood depletion, which is undertaken to "normalize" the age-class structure of the natural forest, will inevitably mean further wood supply shortages, job losses, and community instability.

While the hearing was underway, the MNR started to develop a new "Timber Production Policy" to replace the provincial timber targets set out in the obsolete and flawed 1972 "Forest Production Policy". However, the MNR failed to complete this new policy before the hearing ended, and the Board was forced to make its decision "without a clear statement of the overall provincial harvest target, the basis for harvest decisions" at the local level. The Board ordered the MNR to complete the new policy by the end of 1994; however, the conditions of approval provide little substantive guidance as to the content or requirements of the new policy. Accordingly, conservation groups, including those consulted by the MNR on the new policy, remain greatly concerned that the new policy will set unrealistic timber targets without sufficient regard for the biological capability of Ontario's forests to produce and sustain those targets.

Clearcut Size

Not surprisingly, the size, configuration and contiguity of clearcuts in Ontario became the most contentious issue at the hearing. Most conservation groups recognize that the boreal forest is a "disturbance" forest, and acknowledge that clearcutting is a legitimate harvest method when used in appropriate circumstances to create cutovers which simulate natural disturbance patterns. However, these groups advocate strict controls on clearcutting in order to prevent or minimize the adverse ecological and silvicultural effects of clearcutting (i.e. habitat destruction, loss of diversity, site damage, erosion, and undesirable hydrological impacts).

To its credit, the Board decision imposes a restriction on clearcut size. Unfortunately, the Board's "limit" is 260 hectares, which is twice as large as the maximum 130 hectares size prescribed by the MNR's Moose Habitat Guidelines. It is also noteworthy that the Board's clearcut "limit" may be exceeded where larger cutovers are necessary for "sound biological or silvicultural reasons." Given that the MNR claims that most clearcuts are now less than 260 ha in size, it appears that the Board's "limit" is not likely to change current clearcutting practices in Ontario. Conservation groups maintain that contiguous clearcuts still often greatly exceed 260 hectares.

Significantly, the Board decision fails to impose any substantive restrictions on clearcut layout or the timing of return cuts. Instead, the decision leaves it to the MNR to develop a set of "Environmental Guidelines" which, among other things, is to provide direction on clearcut configuration and contiguity. Given that the MNR consistently denied that there are any problems with current clearcutting practices, conservation groups remain concerned that the new guidelines will not provide sufficiently rigorous standards respecting clearcut configuration, leave blocks, or return cuts.

Old Growth

The Board decision correctly recognizes the need to protect and conserve old growth ecosystems in Ontario. However, the Board's conditions of approval respecting old growth are inadequate and out of step with public expectations regarding old growth. For example, the Board decision gives the MNR up to nine more years (i.e. the term of the EA approval) to "investigate" old growth and "develop policy" on an old growth conservation strategy. Conservation groups believe this gives the MNR an unacceptably lengthy period of time to undertake work which should have been completed at the present time.

As an interim measure, the Board has ordered the MNR to use its Area of Concern ("AOC") planning process where operations are proposed in areas containing old growth red and white pine. Not only does this condition ignore other old growth ecosystems, but it also overlooks the fact that the AOC planning process can still prescribe normal operations (i.e. road building and clear cutting) within AOCs. In addition, the Board's conditions are inconsistent with the recommendation of the Ontario's Old Growth Policy Advisory Committee, which issued its interim and final reports after the EA hearing ended. These reports contain a number of detailed recommendations to protect old growth red and white pine in the province. However, the MNR has yet to act upon, or even respond to, these recommendations.

Integrated Forest Management

The Board decision states that it would be desirable for the MNR to move beyond mere "timber management" to more holistic "integrated forest management". However, rather than order the MNR to develop and phase-in ecosystem-based forest management, the Board decision simply requires the MNR to "investigate" and "research" various aspects of forest management. Therefore, rather than imposing an enforceable condition which would hold the MNR accountable, the Board decision simply elects to rely upon "public and political scrutiny" to ensure that progress is made with respect to this issue.

Because the Board's decision permits the MNR to continue its myopic focus on "timber management", non-timber values will still exist only as constraints to timber production, and they will not be properly integrated within the MNR's planning process. This is likely to result in more, not less, adversarial and expensive land use conflicts across the province. The Board's endorsement of the timber management status quo also appears to be at odds with the MNR's own policy commitments (i.e. *Direction 90s*, *Sustainable Forestry, Policy Framework for Sustainable Forests*) to a more integrated approach to resource management.

Conclusion

The Board's decision marks the formal end to the longest and most expensive environmental assessment hearing ever held in Ontario. Was it worth the considerable investment of time and resources? With respect to procedural issues, the answer is yes: the decision includes many substantial improvements to the MNR's timber management planning process (i.e. creates local advisory committees, enhances public notice and comment opportunities, and provides rights to file appeals or requests for individual EAs).

However, with respect to the substantive issues discussed in this article, the answer is likely no. Undoubtedly, the critical public scrutiny that the MNR received under Ontario's *Environmental Assessment Act* hastened some long overdue reforms and policy commitments within the MNR. Nevertheless, because the Board generally failed to move the yardsticks ahead on the key challenges of the 1990s (i.e. forest sustainability, biodiversity conservation), the decision is generally regarded by conservation groups as a profound disappointment. In short, conservation groups increasingly believe that the Board decision has squandered a unique opportunity to ensure that Ontario's forests do more than provide fibre to the province's mills.

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Recent Developments in Canadian Mining Law

*by Susan Blackman**

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Mining

Interests in Claims — Nature of 100% Participating Interest

In *Silver Butte Resources Ltd.* v. *Esso Resources Canada Ltd.*, [1994] B.C.J. No. 1125 (QL) (S.C.), the defendant had earned a 100% participating interest in certain claims from the plaintiff under an option agreement. The plaintiff objected to the defendant's performance of its obligations. In analyzing the agreement, the judge addressed the issue of the nature of the 100% participating interest granted in this agreement. He held that it was not an ownership interest even though the claims were to be held in the name of the participating interest owner.

Option Agreements — Assignability

In *Silver Butte Resources Ltd.* v. *Esso Resources Canada Ltd.*, [1994] B.C.J. No. 1125 (QL) (S.C.), an option agreement was assigned by the optionee without the permission of the optionor. The plaintiff optionor subsequently objected to the assignment and relied on a general principle that the burden of a contract cannot be assigned. However, the judge held that both the benefit and the burden of a contract may be assigned without the consent of the non-assigning party where the contract does not rely on personal skill or service or where the contract does not expressly state it may not be assigned. In this case, the option agreement was silent on the matter of assignment. Also, the judge held that the obligations of the optionor under the agreement were not dependant on the optionee. Thus, this contract could be assigned without the consent of the plaintiff. This legal interpretation resolves the legal problems associated with a chain of transfers of interests that takes place without the consent of the non-transferring parties ever having been sought. Such chains of transfers are common in both the mining and oil and gas businesses. The objection was raised that the plaintiff would not be able to sue any of the assignees on the contract since it was not privy to the assignments. However, the judge thought that the plaintiff would be able to sue given that the assignors had ensured that the terms of the assignment included being bound by the obligations in the original option agreement and given that, under the agreement, the right to mine was dependant on four conditions in favour of the plaintiff. For the latter proposition, the judge relied on *Tito* v. *Waddell*, [1977] Ch. 106, to hold that where a contractual benefit is conditioned directly on the performance of obligations in the contract, the assignee must accept the burdens also.

Coal Processing — Meaning of "processing of ore" in *Excise Tax Act*

In *Canadian Pacific Ltd.* v. *Canada*, [1994] F.C.J. No. 933 (QL) the Federal Court of Appeal considered the meaning of "processing of ore ... to the prime metal stage" as used in the *Excise Tax Act*, R.S.C. 1985, c. E-15 and applied to coal in order to decide wether the plaintiff was entitled for a fuel tax rebate. The Canadian International Trade Tribunal (CITT) had ruled that "prime metal stage" had no settled industry meaning and that its meaning was to be determined by the ordinary meaning of the words. The Trial Division had concluded that there was an accepted industry definition and that "prime metal stage" for coal meant the stage at which it has the highest carbon content. (*See Canadian National Railways Co.* v. *Canada*, [1993] F.C.J. No. 258 (QL), reported in *Resources* No. 43.)

The Court of Appeal agreed with the decision of the CITT that coal is at a stage "equivalent to the prime metal stage when it is a homogeneous material in a form appropriate for handling and transportation." Handling the coal by "blending, crushing or pulverizing ..., adding or removing moisture, does not constitute processing ore ... to the prime metal stage or equivalent." Such action is actually preparing coal for a specific use for a specific customer.

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Materials prepared for the course draw upon Canadian cases and problems involving the petroleum industry. The course is conducted by Professor Nicholas Rafferty of The University of Calgary Law School, and Susan Blackman, Research Associate of the Institute. The course may be offered publicly, or in-house to oil company employees.

For more information about the Contract Law Course please contact Pat Albrecht at (403) 220-3974.

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