M-18

ISSN 1180-436X

Legislative Assembly
of Ontario

First Session, 38th Parliament

Assemblée législative
de l'Ontario

Première session, 38e législature

Official Report of Debates (Hansard)

Monday 6 June 2005

Journal des débats (Hansard)

Lundi 6 juin 2005

Standing committee on the Legislative Assembly

Environmental Enforcement
Statute Law Amendment Act,
2005

Comité permanent de l'Assemblée législative

Loi de 2005 modifiant des lois
sur l'environnement
en ce qui concerne l'exécution

Chair: Bob Delaney
Clerk: Douglas Arnott

Président : Bob Delaney
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Telephone 416-325-7400; fax 416-325-7430
Published by the Legislative Assembly of Ontario

Service du Journal des débats et d'interprétation
Salle 500, aile ouest, Édifice du Parlement
111, rue Wellesley ouest, Queen's Park
Toronto ON M7A 1A2
Téléphone, 416-325-7400; télécopieur, 416-325-7430
Publié par l'Assemblée législative de l'Ontario

LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON THE LEGISLATIVE ASSEMBLY

COMITÉ PERMANENT DE L'ASSEMBLÉE LÉGISLATIVE

Monday 6 June 2005

Lundi 6 juin 2005

The committee met at 0934 in room 228.

SUBCOMMITTEE REPORT

The Chair (Mr. Bob Delaney): Good morning, everyone, and welcome to the standing committee on the Legislative Assembly. We are here to consider Bill 133, An Act to amend the Environmental Protection Act and the Ontario Water Resources Act in respect of enforcement and other matters. We'll begin this morning with the suspenseful reading of the subcommittee report. In his finest radio voice, John Wilkinson.

Mr. John Wilkinson (Perth–Middlesex): Thank you, Mr. Chair. Good morning.

Your subcommittee on committee business met on Thursday, June 2, 2005, to consider the method of proceeding on Bill 133, An Act to amend the Environmental Protection Act and the Ontario Water Resources Act in respect of enforcement and other matters, and recommends the following:

(1) That the committee meet for the purpose of holding public hearings on Bill 133 at Queen's Park as follows: Monday, June 6, 2005, from 9:00 a.m. to 12:00 noon, subject to witness requests and the direction of the Chair.

(2) That the clerk of the committee post notice of hearings as soon as possible on the Ontario parliamentary channel and on the Internet.

(3) That the deadline for receipt of requests to appear be 4:00 p.m. on Friday, June 3, 2005.

(4) That the following be invited to appear before the committee as witnesses: David Donnelly, Environmental Defence Canada; Chris Hodgson, Ontario Mining Association; Robert Wright, Sierra Legal Defence Fund; Paul Muldoon, Canadian Environmental Law Association; Mark Mattson, Lake Ontario Waterkeeper; Faith Goodman, Canadian Petroleum Products Institute; Dr. Riina Bray, Ontario College of Family Physicians; Lisa Kozma, Canadian Manufacturers and Exporters or Canadian Vehicle Manufacturers' Association; Honourable Perrin Beatty and David Surplis, Coalition for a Sustainable Environment.

(5) That notice of the hearings be provided to the witnesses that previously appeared before the committee on Bill 133.

(6) That the length of presentations for witnesses be 10 minutes.

(7) That each of the three parties be allowed to make an opening statement of up to four minutes, subject to availability of time and at the direction of the Chair.

(8) That the committee clerk, at the direction of the Chair, be authorized to schedule witnesses.

(9) That the deadline for written submissions be 12:00 noon on Monday, June 6, 2005.

(10) That proposed amendments to be moved during clause-by-clause consideration of the bill should be filed with the clerk of the committee by 2:00 p.m. on Monday, June 6, 2005.

(11) That clause-by-clause consideration of the bill commence at 4:00 p.m. on Monday, June 6, 2005.

(12) That the clerk of the committee, in consultation with the Chair, be authorized prior to the adoption of the report of the subcommittee to commence making any preliminary arrangements to facilitate the committee's proceedings.

I so move.

The Chair: Discussion on the subcommittee report? Shall the report be adopted? Carried.

ENVIRONMENTAL ENFORCEMENT STATUTE LAW AMENDMENT ACT, 2005

LOI DE 2005 MODIFIANT DES LOIS SUR L'ENVIRONNEMENT EN CE QUI CONCERNE L'EXÉCUTION

Consideration of Bill 133, An Act to amend the Environmental Protection Act and the Ontario Water Resources Act in respect of enforcement and other matters / Projet de loi 133, Loi modifiant la Loi sur la protection de l'environnement et la Loi sur les ressources en eau de l'Ontario en ce qui a trait à l'exécution et à d'autres questions.

The Chair: Opening statements: Mr. Barrett, you have four minutes.

Mr. Toby Barrett (Haldimand–Norfolk–Brant): Thank you, Chair. Mr. Miller may want to comment as well as we get up to speed.

It certainly has been a bit of a long and winding road to this point. I will stay tuned today—nothing will surprise me—to see where we go next. There are what I consider some bizarre twists and turns that continue as this ship heels from one side to the other.

We have a bill, Bill 133, that was flawed upon its introduction. We initially received 130 pages of amend-

ments. You will recall that during clause-by-clause, just before we were to vote on various sections, we continued to receive amendments. I recall that two of them were up to seven pages long. So I'm concerned.

We will hear testimony this morning. I regret that deputants have received such short notice to come in and testify. In advance, I want to thank people who do approach the witness table. They would obviously have been asked to do a fair bit of work over the weekend to be able to get here this morning to help us make sense of what's going on with Bill 133.

We have two versions of the bill before us now. The second version added another 20 or 25 pages. I don't know whether we debate this tomorrow. We will have a third version that I guess the printing presses will be running tonight. I regret this. I feel it's poor form. I personally feel somewhat embarrassed to be part of all of this.

Mr. Miller, I don't know if you have any comments.

Mr. Norm Miller (Parry Sound–Muskoka): Certainly. I would just like to say that I was a little surprised to learn, having missed one day of the Legislature last week—I went away on Thursday to Montreal to go to my daughter's graduation, which was on Friday. While there, I received an e-mail from my staff notifying me of this meeting Monday morning, that it would be clause-by-clause, at which point I responded via BlackBerry, "No, we just had clause-by-clause on this bill," not knowing that during my one day away from the Legislature, second reading came and went on the bill and clause-by-clause was happening again.

I have to say that it's an unbelievably rushed process. I would ask, what is the rush? Why not take the time to get it right?

0940

I'm glad to see there are some specific groups that have at least been invited, because the notice period was so unbelievably short, but I note that the Ontario Forest Industries Association, one of the major industries of the province, is not on the list of those who might give comment. I'm sure there are other groups as well that are not on the list. I would just like to question the whole process we're going through, why we're rushing things so much.

Mr. Rosario Marchese (Trinity–Spadina): I too, like the concerned members, feel that this process has been very convoluted. It took the government six months to bring it back for debate after they said how important and critical this bill was, including comments at the time from the Premier, who said, "The proposed legislation would also hold corporate officers and directors more accountable. A conviction could result in sentences ranging from fines against a company to up to five years of jail time for its directors and officers." That was on October 8 of last year.

Things have changed, of course, through the amendments, but they've brought it back here directly for second reading, rather than having the debate on second reading in the Legislative Assembly. If they had any interest in changing the bill, I would have thought that they might have pulled back the old bill, reintroduced the bill with the changes, debated it for second reading and brought it back to hear what people have to say based on those amendments they clearly had in mind to introduce. Then you have a clean process where, having heard people, you debate the bill and the amendments clause by clause, and you're done.

As it is, we passed the clause-by-clause last Monday and had the debate on the bill on Thursday, only to have another subcommittee and be sent back to committee for another quick run: having people come back, both environmentalists and the corporate sector, to respond to the bill and the amendments. We might have amendments once again; God knows. I don't know. I'm not sure who's bringing back amendments, given that we just dealt with this a short while ago.

It is a very convoluted history. I don't know whether the government knows what they're doing. Clearly, they're very confused and torn by various people who have given them input one way or the other. I hope this doesn't go through another tortuous process today, but we'll see.

Mr. Wilkinson: I think it was Winston Churchill who said there are two things that you shouldn't see the making of: laws and sausage. I think this has been one of the most transparent and democratic processes for any bill that we've seen in quite some time in this province.

The bill was introduced last October, as you know, and there were extensive consultations: months and months. People came to the government with diametrically opposed opinions on the bill and were able to share that with the government. The minister therefore looked at amendments. We took this bill out to committee after first reading, which of course is not the normal course, so that people could have a fulsome discussion, and I want to thank the opposition parties, both of which made amendments that the government agreed to.

I think, in the greatest sausage-making tradition of this province in regard to laws, we ended up with a much better bill. One thing I caught is that there wasn't anybody who came and said they didn't believe in the principle that if you pollute, you pay. The question was, how do we do that? Do we follow the American standard and add the tool of environmental penalties?

That's what's happening in this province. I want to personally thank all those who came. Many have come back today, because they get to comment on the bill as it's been substantially amended through this process where all three parties had input on the bill that will be going back for third reading.

Thank you, Mr. Chair.

The Chair: Thank you. We are fortunate enough today to have a number of deputations who may have spice to add to the sausage.

Interjection.

The Chair: You never know. It might be halal.

SIERRA LEGAL DEFENCE FUND

The Chair: Sierra Legal Defence Fund. Good morning and welcome.

Mr. Robert Wright: Good morning, Mr. Chairman, ladies and gentlemen. Thank you for hearing our deputation.

The Chair: Although we've done this once before, just before you start, please state your name for the purposes of Hansard. You'll have 10 minutes this morning. Please begin when you're ready.

Mr. Wright: My name is Robert Wright. I am legal counsel with Sierra Legal Defence Fund here in Toronto. I was the final speaker at the last session, and now I'm first.

We're in favour of this bill moving forward. We think that Winston Churchill would think it's a pretty good sausage, with all its warts.

My focus earlier was on the standard under the Environmental Protection Act and the "likely" to "may" shift. We note that there has been a compromise on that. We understand that it has largely been at the suit of industry. In particular, that compromise has been with regard to prosecutions. So from our standpoint, we would strongly oppose any further compromises. We think enough compromises have been made.

We're glad to see that there has not been a compromise on the onus under the directors and officers provision. From a substantive point of view, that merely follows what has already been established in the Bata case, but makes it more clear and sets down the game rules so that everyone knows what they're playing under. From a procedural point of view, it also reinforces what was said in R. v. Sault Ste. Marie, which is that when you are dealing with large corporations, they are the ones who best know what is going on in the minds of their directors, and that's what we're dealing with with these MISA companies.

I'd like to briefly comment on the environmental law section comments which I saw in the last submissions. I'd point out that although it's called the environmental law section, it's really, from our standpoint, the industry environmental defence section of the Ontario bar. It reflects industry concerns. It does not reflect the concerns of the environmental groups of like mind to Sierra Legal.

I think you should be proud that this legislation will set the benchmark for other provinces to follow. I think it is a progressive piece of public interest litigation.

I'd like just to quote from a book edited by Professor Friedland. It's an article written by Richard Brown and Murray Rankin. They summarize, I think, quite nicely the effect of administrative penalties. They say, "Regulators who can impose administrative penalties are much better equipped to tackle this compliance deficit than those who must resort to criminal prosecution. The administrative process responds to risk rather than to harm, does not unduly stigmatize offenders who are thought not to warrant moral opprobrium, applies a standard of absolute as opposed to strict liability in at least some cases, entails minimal operating costs, and imposes monetary penalties large enough to have a reasonable prospect of deterring offenders. Criminal prosecution, the most common sanction of last resort among Canadian regulatory agencies, scores poorly on all these counts."

They go on to suggest, of course, that you need both, which we will have.

So it's not perfect, but it's pretty darned good. I'd ask that we get on with making polluters pay. Thank you very much.

The Chair: Thank you. We should have a little bit of time for questions this morning, beginning with Mr. Barrett.

Mr. Barrett: Thank you, Chair, and thanks to Sierra Legal Defence Fund.

The lead that Dr. Isobel Heathcote took on the IPAT report to government—the executive summary, for example, doesn't mention administrative penalties. There is mention of penalties in the body of the report, much of it as a platform to discuss carrots in addition to sticks. It's used, in my reading of Dr. Heathcote's report, as recommendations to the government to move beyond the command-and-control and fine-and-penalty approach.

As we all know, a number of recommendations have come forward. Do you feel there could have been additional reflection on those suggestions for incentives, for example, to help prevent these kinds of problems, or is that not possible in the context of this legislation?

0950

Mr. Wright: I think we need all three: criminal prosecutions, administrative penalties and the carrots you're referring to. My understanding is that there are initiatives going on as we speak, and have been going on for some time, to get industry together with government and to streamline approaches where industry has shown it's acted responsibly with respect to the environment. So all three approaches are necessary; I would agree with that.

Mr. Marchese: Mr. Wright, the government has moved away from their initial use of the lower threshold for determining adverse effects to the natural environment, constituted by the term "may," to the higher threshold for proving environmental harm by the use of the word "likely." You made reference to this, but are you not bothered by it? Because I am.

Mr. Wright: The move, as I understand it, has not been made with respect to prosecution. So it remains at "likely" that the administrative penalties will be moving to "may." I started and finished my remarks by saying it ain't perfect; this is where it ain't perfect. On the other hand, with prosecutions, those will usually be the most serious fact situations. If it's going to be criminal prosecution with that stigma, I can understand the policy reason for going the two directions, although I would have frankly preferred the "may" standard for both.

The Chair: Thank you. Mr. Wilkinson?

Mr. Marchese: I have another question.

The Chair: Is it a quick one?

Mr. Marchese: Yes. With respect to removing directors from any liability, do you have an opinion on that?

Mr. Wright: They have not, as I understand it, been removed from liability, and I don't think they should be. There was a push to get rid of the reverse onus on them, and that I would object to. If any further changes were made in that direction, (1) they would be unnecessary, and (2) they would take away any of the teeth of the administrative penalty.

Mr. Wilkinson: Thank you for coming, Mr. Wright. Just to clarify the question about directors that has to do with environmental penalties, we issue environmental penalties to those corporations that have their certificate of approval; in other words, we know who they are. But that doesn't change the question of liability for directors in regard to prosecutions.

But my question to you has to do with the fact you referenced the Bata case. We've heard a lot about R. v. Sault Ste. Marie and also the precedent in the Transport Robert case. I think you also mentioned Bata. Could you briefly outline that case for us?

Mr. Wright: The Bata case basically stands for the principle that is being put forward in subsection 194(2.1), the onus section. In that case, an Ontario court held that under the legislation, there was nothing contradictory and offensive to the law that in a situation where the crown had put forward the facts of harm to the environment, the directors having the best knowledge of what they have or haven't done to prevent that harm should, at that point, have the onus shift to them to prove that they took all reasonable steps to avoid it.

The Chair: Thank you very much, Mr. Wright.

ENVIRONMENTAL DEFENCE

The Chair: Environmental Defence: Good morning. Welcome.

Dr. Rick Smith: Good morning.

The Chair: You have 10 minutes before us this morning. Please begin by stating your name for the purposes of Hansard. If there's time remaining after you've made your deputation, it will be divided among the parties for questions. The floor is yours.

Dr. Smith: Thank you very much, Mr. Chair. My name is Rick Smith. I'm executive director of Environmental Defence. I'd like to say good morning to everyone and a very happy national Environment Week. I hope you all heeded Minister Dombrowsky's suggestion in the Toronto Star this morning and enjoyed your public transit ride to work. Though it's very nice to see you all, I wish I could say that my organization is delighted to be presenting to this committee on this subject for a second time; actually, we just want this thing passed as soon as possible.

Environmental Defence supports Bill 133 as it was debated and passed at second reading. Though somewhat weakened from its initial introduction, the bill is still a useful response to a pressing public policy need.

I should hasten to add, though, that any further weakening of this bill will cause us to re-evaluate our support. No further amendments are necessary. This piece of legislation is so essential, so long overdue, that our expectation is that it will be passed by the Legislature before the summer recess.

I think the overall context of Ontario's pollution crisis is important to note here. Simply put, Ontario has become one of the worst polluting jurisdictions in North America. In 2002, the last year for which data are available, over one billion kilograms of pollutants were reported released into Ontario's air and water, making Ontario by far the most polluted province in Canada. Releases to air included over 964 million kilograms of pollutants with respiratory effects, almost two million kilograms of carcinogens and over 162 million kilograms of pollutants with developmental and reproductive effects. Overall, between 1995 and 2002, the total release of pollutants in Ontario, as reported to Environment Canada, grew by 54%. Some of that is certainly an artifact of better sampling, better methodology, but any way you slice it, that is not good news.

Every year, the NAFTA Commission for Environmental Cooperation, the CEC, reports on the continent's progress on pollution prevention. In its latest report, released just two weeks ago, the 2002 Taking Stock report—I have a copy here—the CEC noted that, for the 203 toxic chemicals it tracks, Ontario is the second-worst polluter in North America. Only George Bush's Texas releases and transfers more pollutants on our continent.

The CEC also notes that though Canadian facilities only represent 5% of the total facilities reporting lead and its compounds, Canadian industries accounted for an incredible 42% of air emissions continent-wide in 2002. Air releases of lead were, on average, more than 13 times greater for Canadian facilities than for those in the United States. Ontario is the leader, emitting fully 15% of the total lead air releases in North America. Ontario is the second-worst air polluter overall on our continent.

The statistics quoted in the preceding three paragraphs lay bare the scope of legal pollution in Ontario; that is, the pollution that industries can emit under their relevant government permits, certificates of approval etc. This kind of pollution needs to be prevented, and we certainly hope that the government moves quickly to do so. What Bill 133 does to take a first sensible step toward scaling back pollution is crack down on illegal activity. Frankly, I think this is something that most Ontarians assume their governments are doing anyway. The need for this bill could not be clearer.

MISA facilities accounted for 84% of reported illegal pollution spills by volume in 2003 and 97.9% in 2004. They are clearly the right industries for Bill 133 to target. From 2003 to 2004, reported illegal spills by MISA facilities increased in frequency, increased in volume and increased in average weight. The frequency increased by 13%.

I won't read you the whole list, but these are not trivial chemicals that we're dealing with. The list of spilled contaminants, as reported by industrial facilities to the MOE, is extensive and includes many, many poisonous and toxic substances.

Available evidence indicates that many MISA facilities are not complying with current law and regulation. Again, I won't belabour the statistics here, but you know that the recently released report by the MOE swat team, titled Environmental Compliance in the Petrochemical Industry in the Sarnia Area, revealed an almost 100% lack of compliance with existing law and regulation. Almost one quarter of the facilities inspected had no spill prevention plan, no spill contingency plan or just had one of the two.

1000

So in sum, our province is now an internationally recognized, continentally significant pollution delinquent. This enormous pollution problem is the result of years of inaction by government and a lack of priority by industry. Bill 133 responds to MISA facilities' current lack of compliance with environmental law and regulation with instruments that already exist in other jurisdictions in the US and in Canada. This isn't rocket science; it doesn't reinvent any wheels. It's time to get on with the job of pollution prevention in Ontario. Bill 133 requires no further amendment.

I have to say I'm dismayed that, even with the almost 100 pages of amendments to this bill introduced at first reading, in response largely to industry concerns, some industries continue to oppose this bill. They're still demanding further weakening, and one has to conclude, frankly, that these are the antisocial defenders of a toxic status quo. Their arguments boil down to an appeal to this Legislature to go easy on their illegal activities, and I think they should be ashamed of themselves. Making illegal polluters pay to clean up their own mess is the right thing to do, both economically and environmentally. Every day that Bill 133 doesn't pass results in measurable hardship for Ontarians and their communities.

I'll end as I began: The best way for this committee and the Legislature to celebrate national Environment Week, which begins today, which kicks off with this committee hearing, is to pass this bill, as it is, in the next few days.

The Chair: Thank you. We should have time for one focused question, Mr. Marchese.

Mr. Marchese: Mr. Smith, are you anticipating any amendments today?

Dr. Smith: I think I've made it clear that we're hoping there are no amendments today. I'm not quite sure what to expect.

Mr. Marchese: Me neither.

Mr. Wilkinson: It's going to be a good week.

Dr. Smith: Excellent.

Mr. Marchese: So why are we here?

The Chair: Thank you very much for your deputation this morning.

ONTARIO MINING ASSOCIATION

The Chair: Ontario Mining Association, good morning.

Mr. Chris Hodgson: Good morning, Chair Delaney, and committee. My name is Chris Hodgson, and I'm the president of the Ontario Mining Association. I also have 25 copies of my presentation, if somebody wants to grab those.

Thank you for giving the OMA time on the agenda today, Mr. Chair and committee members. We were pleased to make a presentation to you during the last round of hearings. The Legislature has decided to consult further with stakeholders, and we're here today to emphasize three concerns we still have with Bill 133.

Let me start by saying that the OMA feels there have been improvements made to the bill during the committee process. The minister went out of her way to hear our concerns and through amendments has addressed many of the offensive aspects of the original bill. We strongly feel that there should have been consultation with the affected industries prior to introduction, but we really appreciate the minister's willingness, and that of many MPPs and cabinet ministers, to meet with the OMA and member companies subsequently.

In those meetings, we have emphasized that Ontario is an envied mining jurisdiction around the world. This is not only because of our geological resources, but it's because of the certainty of operating costs based on clear, science-based and consistently enforced laws. Bill 133 has the potential to take us away from that environment. Let me give you the reasons why.

As I said at the first reading hearings, the Ontario Water Resources Act changes should be subject to a separate bill. These changes apply to all Ontarians and lead to the basis of enforcement of the OWRA, and therefore require consultation with the public at large. That being said, however, the implication for our members is as follows:

A pollution offence, under section 30 of the Ontario Water Resources Act, should be based on the circumstances of the discharge and not just the nature of the discharge. The definition for "deemed impairment" under the Ontario Water Resources Act only looks at the material being discharged. It does not look at the circumstances of the discharge, such as how much is being discharged or even the risk of an adverse effect. This would be problematic for the metal mining industry. For example, every bit of seepage from a rock pile could be considered an offence because it would contain metal. There would be no consideration as to whether or not the seepage could or would cause an adverse effect.

Subsections (d), (e) and (f) of the proposed definition for "deemed impairment" focus solely on the characteristics of the material being discharged. The Ontario Mining Association would like to see these subsections amended so that the circumstances of the discharge are included in the definition. That's the major concern. That

moves us away from a science-based risk process, which most jurisdictions operate under, and clear laws.

Our second concern, which isn't as major—that's our major one—has to do with the new fine structure and the penalty sections. Our members are quite concerned about the lack of due-diligence defence for environmental penalties. Any company that does all that it could and should be doing to prevent an event, and then compensates and remediates after an event, should not be penalized. Environmental penalties should not be applied to self-reported exceedances. This, combined with absolute liability provisions, makes it impossible for anyone to defend themselves. Without a due-diligence defence, a regime that would follow the act could easily be set up whereby you exceed a limit, you report and you pay. These are legal limits. This appears to be a new tax.

Unlike the other MISA sectors, the metal mining and industrial mineral sectors have concentration limits, measured as milligrams per litre. Operations have been working on increasing water recycling and working toward zero discharge as much as possible. However, the more the water is recycled and reduced, the higher the concentration may be in the discharge. The total loadings still decrease and the potential for adverse environmental effects decreases; however, the potential for exceedances increases.

In 2002, the mining industry was 99.6% in compliance with all of the required MISA limits for the chemical parameters of its discharge samples. Given that thousands of samples are taken each year, the 0.04% non-compliance rate means that there were 40 exceedances. These exceedances are self-reported to the MOE.

The proposed fine structure—this is the fine structure, not the penalties—is equally troubling. The wording in Bill 133 implies that at least the minimum fine would be charged for each exceedance as long as there were no aggravating factors. According to the proposed legislation, if each exceedance was by a different company, the total fines to the industry would be $1 million. Given that there's no limitation on the cumulative nature of these fines, the industry would be subject to a minimum of $2 million in fines the following year and $4 million in fines after that. The proposed prescriptive fine structure places too much emphasis on the discharge and not enough emphasis on the effects to the environment.

The third area is the special-purpose account. There were no amendments proposed to this section.

Responsible parties are already required to compensate the private sector, municipalities and the provincial government for their reasonable expenses associated with the incident. A community fund would duplicate this allotment, and it's not clear where this money is being allocated, nor who is responsible for managing this money. We would suggest the community fund should not be used for projects unrelated to the incident. It should be used only in those communities where the incident took place. Responsible parties should not be required to pay twice for the same incident, and there must be clear and transparent accountability for how these funds are used.

Let me finish by saying that mining today is a modern, safe, environmentally responsible, high-tech industry. Mining is a solution provider. Ontario's mineral products, along with being the building blocks of our modern society, are used to reduce energy consumption, cut emissions, clean up the environment and reduce pollution. Mining is one of the few industries which take place in all parts of the province, and all of the province benefits from the social and economic contributions of the mining industry. As I said in my last presentation, but it bears repeating, along with improvements to safety, our operations have a new environmental focus.

I urge you to consider how Bill 133 will have a direct impact on the ability of Ontario's companies to compete, because it takes away an advantage we have: clear laws with predictable costs. The Mining Act is clear and consistently applied. Certificates of approval and MISA rules are clear, and we have practices that meet them. Our concern is that Bill 133 changes the certainty of operating compliance costs.

I've made a personal appeal to the minister, and will repeat it into the record today, that we would like to be consulted in the drafting of the regulations. This would allow our members and the Ministry of the Environment to understand the impact ahead of time. It would also ensure that the Ontario mining industry remains both a competitive and an environmentally conscious member of our society.

Thank you very much for your time.

The Chair: Thank you. If we can be thoughtfully concise, we should be able to manage one brief question per caucus, beginning with Mr. Wilkinson.

1010

Mr. Wilkinson: Thanks for coming in again, Chris.

Just a question about the mandating of spill prevention and spill contingency plans: Do you think mandating that—that's something that some of your members, if I recall, have and others don't—will help raise that bar, so that all members will—

Mr. Hodgson: Exactly. We're in favour of that. A lot of our companies have invested millions and millions of dollars on ISO 14001 standards or other systems like that. You want to get a handle on everything that's happening in your operation, from the plant floor, from the ground, right up to the head office. There has been a lot of money spent on that, and a lot of time. It takes a daily effort, similar to what we did around safety.

Mr. Wilkinson: Some of the members of your group have said that, that they've done the right thing and they have competitors who haven't—

Mr. Hodgson: Right, and now they're penalized.

Mr. Wilkinson: But now, by raising up the standard—

Mr. Hodgson: That's a good thing in the amendments. That's fine. You're trying to use the carrot a bit.

Mr. Miller: Thank you, Chris, for coming in again today.

On your point that environmental penalties should not be applied to self-reported exceedances—and you point out that in the mining industry, 99.6% are in compliance—with the passage of this bill, could you see a situation where industry doesn't report their exceedances because they know they're going to receive a fine? It's a given. They're going to receive a fine, so it could actually work against the goal of the bill, which would be to prevent—

Mr. Hodgson: It takes away the incentive, but the companies that we represent are large international companies, for the most part, and they want to do the responsible, right thing.

With the MISA requirements, there are about 10,000 tests a year for various components of what is emitted. The point is that, for example, during the spring runoff, the other water going into the pond is probably more contaminated than what's gone through the purification system, but occasionally you get an exceedance. Out of 10,000, there would be about 40. Some of them are just errors at the lab, some of them are due to the spring runoff, and there are other things that happen out of 10,000 tests. There's no adverse effect because the receiving body, in most cases, is more contaminated with the background minerals. We're talking about mineral mining, where these things occur naturally in nature. It's not some other kind of process where you're creating a new compound.

All we're saying is, with the cumulative nature of this, if you're fined on that, then the next year you get 40 on top of it and you go up another threshold in the tiering system. We just think there should be some amendment or some acknowledgement that self-reporting MISA exceedances—you'd have to work it out so it didn't affect the environment but take into account the present state of affairs.

The way around this, and that's why it's not a big issue for us, is that you just stop recycling water. The more you recycle water, the more concentrated you get. It's better for the environment, your loading is less, but it's easier to operate if you don't do it. Then you're in total compliance, but that sort of goes against what you're trying to achieve here. We want to use less water and get better science and better processes to take it down to zero.

Mr. Marchese: Welcome back, Mr. Hodgson, as a visitor here.

Mr. Hodgson: Thank you. It's good to see you, Rosie.

Mr. Marchese: Mr. Smith said that Bill 133 deals with illegal activities, mostly. I think that was his argument. You're not asking us to go easy on illegal activity, are you?

Mr. Hodgson: No, not at all. Our first and major concern is with the Ontario Water Resources Act, where you're bringing in uncertainty around what is "deemed impairment." We think there should be a regulation-making authority to make it so that there is no adverse impact on the environment but there is some common sense applied here.

For example, in northern Ontario there are lots of lakes that have naturally occurring minerals. If you took water out of that lake and put it into a test tap, under this definition, it would fail. You'd be in violation of the act if you killed 50% of the daphnia in a test tube environment. We think there should be some recognition of the circumstances to which the discharge takes place, so there is not an adverse effect on the environment. There has got to be some scientific, risk-based analysis done on that, and allowed for in the act.

The Chair: Thank you for coming in this morning, Mr. Hodgson.

COALITION FOR A SUSTAINABLE ENVIRONMENT

The Chair: The Coalition for a Sustainable Environment. Good morning.

Dr. David Surplis: Good morning, Mr. Chair. My name is David Surplis. I'm chair of the Council—the Coalition for a Sustainable Environment, and past president of the Council of Ontario Construction Associations. I get those acronyms mixed up sometimes.

Thank you for having this additional session. As you know, we were before you just a couple of weeks ago, on May 12. Just before we presented, the honourable minister presented some amendments, and we asked for an opportunity to respond to those at that time, and so we're grateful for this additional opportunity.

Lots of things have been said about the gestation of Bill 133. Mr. Marchese, for instance, mentioned it at length this morning. But there's one thing that we want to make abundantly clear: Bill 133 is not the bill that we would have envisioned, had all the stakeholders been involved in its drafting, but that's all past. We've had a transparent process, as the parliamentary assistant has so correctly pointed out. We want to reassure everybody that thousands of member companies in the Coalition for a Sustainable Environment—literally, thousands and thousands—are in favour of legislation to protect and enhance the environment. All of them subscribe to the principle that polluters must pay. What we would like is the legislation to be totally workable and in the best interests of everybody—the citizens, the environmentalists, workers, officers and shareholders of companies in the industries that work with natural resources in Ontario.

We perceived a number of unintended problems, or what we thought were unintended, in Bill 133, as it was first drafted, and we sought the opportunity to bring them to your attention. We were pleased when the Honourable Mrs. Dombrowsky introduced amendments to clarify some points of the bill and to improve its application. Some have said that this is watering down, but in reality we believe that all the intended effects of the bill are very much in place.

We were told that the first effect of the legislation was to allow government to be "swift afoot"—that's Lois Corbett's favourite expression—in protecting municipalities' water supplies and to ensure rapid action and

financial recompense when there is a spill or unauthorized discharge. So to provide that speedy response without waiting for potentially lengthy trials, the ministry chose environmental penalties to serve that purpose. Upon passage of this bill, that tool will be available to the ministry and the municipalities and it will be utilized whenever there is a problem.

Once again, I would like to say as clearly as I can that the goal of coalition members is no spills or problems. That's where we want to go, and you heard that from Mr. Hodgson too. It was unfortunate, for example, that in the discussion following the release of the SWAT report, emphasis was made on the negative aspects instead of the many, many evidences of progress being made in the Sarnia area. Again, that's past.

My point is simply this: The government has chosen to address what it sees as a problem in a particular way. The coalition members have not been critical of action being taken; we have been critical of the process in which the action was taken.

However, in response to our complaints and the complaints of others, the government listened and, in a relatively novel move, sent the bill to this committee after first reading. During those first hearings, we said that there were some unintended consequences, and many of our complaints were addressed by amendments, as you well know.

We thought it was unfair, for example, that EPs could be served on employees, when it is the company that controls all aspects of its operations, and that has been removed and we are pleased.

We thought it would be unfair for EPs to be issued by field staff, and that has been addressed by the amendment that says that EPs are to be issued by a director or someone more senior, although the bill still says that the director may delegate his responsibilities.

We believe that EPs should be set at levels commensurate with the amount of damage, that the payment of EPs should be utilized to offset fines under the EPA or the OWRA and that the payment of an EP should not be taken as an admission of guilt. All of those things were addressed by this committee by amendments produced by the minister.

We were alarmed that the value of due diligence was being demeaned and dismissed in the original wording of the bill. The amendment says that actions taken and finances expended by a company can now be recognized in setting the level of EPs, and that helps restore the value of due diligence, which is the cornerstone of best practices.

The amendments accepted after first reading have therefore improved this bill, in our opinion. As I said at the outset, we do not accept that Bill 133 was conceived in the most orderly of fashions, but it can be improved, and for what's been done already, we thank you.

There are, however, a few matters that still cause great concern for stakeholders in industry and commerce. Four principal areas of concern, we believe, require further amendment. We have checked them, and implementing them will not detract from the intent of this bill. In fact, we are firmly of the opinion that what we're proposing will improve the legislation and facilitate compliance. While we might be addressing significant deficiencies in the present bill, what we're proposing is technical in nature and is consistent with the bill's principles.

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The first two areas of concern deal with the same issue: reverse onus. The companies participating in the coalition believe that reverse onus, or "guilty until proven innocent," should not apply in situations that can lead to significant fines and even to jail terms. We believe that the customary civil and legal rights should be applied.

Our first proposed amendment relates to appeal of provincial officers' orders relative to discharges, again, where the reverse onus applies. We believe that subclause 145.5(1)(b)(ii) of the Environmental Protection Act and subclause 102.1(1)(b)(ii) of the Ontario Water Resources Act should be deleted to give effect to the principle of fair defence, but the reverse onus for EPs would still apply.

Our second proposed amendment deals with the responsibilities of officers and directors that are included in the bill. We state as firmly as we can that a reverse onus obligation is troublesome in almost all cases, but it is particularly alarming in what amounts to quasi-criminal matters. There is no question that officers and directors should have duties and responsibilities for the operation of their company, but they should also have access to the norms of Canadian justice.

We therefore suggest that subsection 194(2.1) of the Environmental Protection Act and subsection 116(2.1) of the Ontario Water Resources Act, dealing with "failing to take all reasonable care," as it pertains to preventing a corporation from committing certain offences, should be deleted. That's only with regard to the reverse onus.

The Occupational Health and Safety Act, which of course, we all subscribe to, appears to function very well, and it includes a similar requirement for officers and directors in section 32, but it does not involve a reverse onus. We therefore believe that removing the reverse onus in these areas will not adversely affect the bill. We believe removal of the reverse onus will also send a positive signal to directors and potential directors who are or could be instrumental in creating investment in Ontario.

A third area of concern relates to the provincial officers' orders. By allowing these orders in any case where an EP could be issued relative to a section 14 contravention, the "may cause" threshold applies. Given that reverse onus will still apply in relation to EPs, this wording would make it very difficult, if not impossible—probably impossible—for the recipient of such an order ever to be successful in an appeal. Many of the serious problems associated with the wording change from "likely to cause" to "may cause" were addressed in the amendments proposed by the minister and adopted by this committee. In our opinion, this issue falls into the category of unintended consequences, and we believe it would improve the bill to delete clause 157(1.1)(a).

Finally, coalition members have great difficulty with the definition of "deemed impairment," as was alluded to earlier by Mr. Hodgson, in section 1 of the OWRA. The addition of clause (e)—peer-reviewed articles as proof of impairment—significantly changes the evidentiary issues in relation to "deemed impairment." Here again, we believe there is an unintended consequence in that anyone, with or without expertise or authority, could use this definition for their own purposes in a fashion not necessarily consistent with government policy, because, of course, there are such things as private prosecutions.

Ten minutes isn't a great deal of time in which to make the case for issues of great significance to the tens of thousands of our member companies, their millions of employees and the billions in investment that they represent, but we hope that we have approached this process in a genuine collaborative search for better ways to implement the intent of the legislation. We thank you for your time and your courtesy.

The Chair: Thank you. Almost to the second, that's your time. Your timing is impeccable. Thank you for coming in this morning.

Dr. Surplis: Thank you, sir.

GREAT LAKES UNITED

The Chair: Great Lakes United, please. You've followed the deliberations of the committee very closely, so you pretty much know the ground rules. State your name for the purposes of Hansard, and please begin.

Ms. Jessica Ginsburg: Thank you very much. My name is Jessica Ginsburg, and I am here today on behalf of Great Lakes United. Great Lakes United is a coalition of organizations which includes environmental groups, labour groups and community groups across Canada and the United States. Great Lakes United was founded in 1982 and is dedicated to the promotion of clean water and air and the protection of human and environmental health.

Great Lakes United generally supports this bill, as amended. Although there have been some disappointing changes made since first reading, there have also been some promising additions made in response to stakeholder feedback. Thus, the bill is viewed as a positive step toward greater environmental protection and accountability for spills and other discharges.

When I spoke to this committee previously on the importance of Bill 133, I focused my comments on the changed threshold from "likely" to "may" under the Environmental Protection Act and the new "deemed impairment" provision under the Ontario Water Resources Act. I expressed the view that these provisions created more protective and enforceable thresholds for establishing contraventions under both acts. Subsequent amendments to the bill have unfortunately eroded the use of the "may" threshold; now provisions governing prosecutions and several types of orders, such as control orders and remedial orders, have reinserted the "likely" threshold.

However, the "deemed impairment" provision of the Ontario Water Resources Act has happily remained relatively intact, and I urge you to maintain its current wording. The "deemed impairment" provision will allow the crown to prosecute when a discharge has the potential to cause harm. Without it, the crown effectively needs evidence of actual harm, such as dead fish remains washing up on shore or high concentrations of contaminants, before it can move forward with a case.

This sort of evidence can be extremely difficult for the Ministry of the Environment to collect, given the fact that such material could wash away or become diluted by the time inspectors can respond to a spill. Indeed, the Ontario Water Resources Act was never intended to require such extensive evidence; it was only due to a court decision four years ago that the threshold was elevated to this unrealistic level. The new "deemed impairment" provision is critical to ensuring that the act is once again able to be used in the way it was originally intended: as a zero-tolerance piece of legislation akin to the Fisheries Act.

Great Lakes United also applauds several other amendments which will heighten transparency and public accountability. For instance, provisions have been added to both the Environmental Protection Act and the Ontario Water Resources Act which require the ministry to publish settlement agreements on environmental penalties on the Environmental Bill of Rights registry. These provisions respond to concerns about public accountability that were expressed by numerous environmental groups, including Environmental Defence, the Canadian Environmental Law Association and the Sierra Legal Defence Fund. The EBR postings will alert the public to the existence of such settlement agreements and help to dispel the perception that backroom deals are taking place in which penalties are being unfairly or unreasonably diluted. Ideally, the agreements will be designated as instruments under the registry and subject to appeal.

Similarly, Great Lakes United strongly supports amendments which provide for the publication of an annual report on the use of environmental penalties. The report would set out such information as the amount of the penalties issued, the type of contraventions to which they relate and the nature of subsequent settlement agreements.

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This will help to ensure that environmental penalties remain robust instruments and that public confidence in their use is maintained. It will also provide greater predictability for both industry and the public, as correlations are drawn between the amount of the penalties issued and the existence of various mitigating factors, as prescribed by the regulations. Hopefully, the report will also help to alleviate industry concerns that environmental leaders and laggards are being treated in an identical manner.

Public accountability is further advanced by the inclusion of a five-year review mechanism in both acts. This type of study will allow the environmental penalty

regime to be reviewed in broader terms, and allow its effectiveness to be gauged relative to and in concert with prosecutions. Importantly, the review could provide recommendations on such topics as how environmental penalties can be applied in a fair and transparent manner and how prosecutions can be maintained in the face of a growing reliance on penalties.

Another useful addition to the bill is found in subsection 1(13.1), which requires the development and implementation of spill prevention and spill contingency plans for prescribed classes of persons. This augments the amendment found at subsection 1(8), in which directors are given the authority to order specific property owners or managers to develop and implement these plans. It is hoped that these provisions will be applied to all those covered by the bill and, ideally, expanded to include non-MISA facilities in the near future.

Many stakeholders across a broad range of interests called for a greater emphasis on spill prevention in Bill 133. If liberally applied, these provisions could be very instrumental in curtailing the rampant pollution problems which exist in this province. Bill 133, as it is currently drafted, is an important and necessary step toward effective government oversight of potential polluters.

During these hearings, this committee has been presented with ample evidence of Ontario's worsening pollution problem. Although there are several reasons for the predicament we now find ourselves in, one of the leading contenders is likely the high level of non-compliance which exists in certain industrial sectors. By strengthening our penalty and prosecution regimes, the Ministry of the Environment will be better able to fulfill its mandate and perform its operations in as effective and efficient a manner as possible. For this reason, Great Lakes United wishes to express its support for the overall direction taken by this bill, and urge you to maintain its necessary and long overdue measures without further amendment. Thank you very much.

The Chair: And thank you very much. That pretty much concludes the time that you have available this morning, so thank you again for coming in for your deputation.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

The Chair: Canadian Environmental Law Association, please. Please be seated and make yourself comfortable. You have 10 minutes before us today. If you don't use the entire time, we'll divide it among the parties for questions. Please begin by stating your names for Hansard and then proceed.

Mr. Paul Muldoon: Good morning. My name is Paul Muldoon. I'm the executive director and counsel of the Canadian Environmental Law Association. To my right is Ramani Nadarajah. She is counsel at the Canadian Environmental Law Association.

The Canadian Environmental Law Association has had the opportunity to review the amendments to Bill 133, and we are strongly in favour of the bill. We have some concerns, which my colleague Ms. Nadarajah will address, but I would like to make one or two quick opening remarks.

First of all, we'd like to thank you for your work in ensuring the bill has been strengthened in many ways. The inclusion of spill prevention plans, the making of the settlement agreements public and the annual reports are just a few examples of where, in our view, you have heard the public and have responded appropriately.

I'd like to make two further points. One is that, in my last deputation here, I attempted to bring remedies to show that this is not an academic or esoteric problem. The Ontario environment is being degraded every day by spills. It causes not only environmental problems, but human health problems. So we urge you to carry on with this bill as quickly as possible. The environment and public health demand it. Further, in our view, the government has bent over backwards to accommodate industry thus far. You have done everything in your power as a committee and as a government to appease the very sector that is causing the problem. In our view, the line is in the sand. Get on with the bill and get it passed.

We do, though, urge you to think about a few of the amendments that have been put forth. I would ask my colleague Ms. Nadarajah to address those issues. I'd just like to mention that Ms. Nadarajah was a prosecutor for over five years at the Ministry of the Environment and has built a reputation of expertise in this area.

Ms. Ramani Nadarajah: Thank you, Paul. I wish to focus on three key aspects of this bill that, in my view, are very significant.

As Paul has mentioned, the first issue deals with the deemed impairment provisions. CELA was very pleased that the deemed impairment provisions of the Ontario Water Resources Act were strengthened through the government amendments. We believe that this provision ensures that dilution will no longer be a defence to water pollution in Ontario. I would also add that this provision is very important if we are to ensure source water protection in Ontario, and that was a key recommendation of Mr. Justice O'Connor in his part 2 report of the Walkerton inquiry.

CELA also supports the use of the environmental penalty regime proposed in Bill 133. Environmental penalties have been adopted in other jurisdictions such as the United States and British Columbia. Environmental penalties provide a very expeditious means of dealing with environmental offences. It is CELA's view that the bill needs to be phased to ensure that the environmental penalty regime applies to all companies that may cause spills in Ontario.

The final issue I wish to address deals with the legal threshold for proving environmental offences. CELA was disappointed to learn that the government amendments did not follow through with the proposal in the initial bill to change the legal threshold for environmental offences. Currently, under section 14 of the Environmental Protection Act, in order to obtain a conviction for discharge

of a contaminant, the crown has to prove that the discharge "caused or is likely to cause an adverse effect." In terms of a legal threshold, the courts have interpreted this as requiring proof over 50 per cent.

Bill 133 had proposed that the wording of section 14 of the Environmental Protection Act be changed to "may cause an adverse effect" instead. This would have reduced the legal threshold required for ministry prosecutors to secure a conviction for environmental offences. It is important to note that the use of the word "may" is consistent with the legal threshold for proving water pollution offences. Under the Ontario Water Resources Act, the crown only has to prove that the discharge of a contaminant "may" impair water. Thus the benefit of the proposed change in the initial bill was that all discharges to the environment, whether to air, land or water, would be treated consistently in terms of prosecution.

The government amendment to Bill 133, however, limits the applicability of the "may" threshold under section 14 of the Environmental Protection Act. For prosecutions, unfortunately, it appears that the government has reverted back to the old standard, as it exists under the current act. In CELA's view, there is no legal rationale for the government to treat air pollution or land pollution any less seriously than water pollution. We think this amendment is a step backward for the government.

However, CELA's overall view is that Bill 133 strengthens environmental protection in the province. We believe it is a very significant government initiative and urge you to adopt it as soon as possible. I would caution, however, that CELA's support is contingent on there being no further government amendments that would weaken any of the provisions of this bill or reduce its applicability to business operations in Ontario.

Those are my submissions, subject to any questions.

The Chair: Thank you very much. We should have an opportunity for one question per caucus, beginning with Mr. Wilkinson.

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Mr. Wilkinson: Thank you for coming in. We appreciate the fact that you've been so active on this file for a number of months, as we've sorted our way through it.

The question that I have to deal with is just back on this "deemed" disposition under the OWRA. I don't know if you heard, but some of the people who spoke before mentioned the idea that this would have a perverse effect in the mining industry, where they're trying to reduce the amount of water they use by recycling. They could be, by default, somehow contravening the act because they're trying to do the environmentally friendly thing, but the water they're using could just have natural trace metals. As someone who's a former prosecutor, can you help me sort through the rationale, and why you're in favour of the fact that we've strengthened that?

Ms. Nadarajah: Certainly. I did hear the submissions by the Ontario Mining Association and others with respect to the deemed impairment permission. I think it's important to note that the problem began in 2001 with an Ontario Court of Appeals case called R. v. Inco. In that case, the court held that in order to secure a conviction under the Ontario Water Resources Act for pollution, the crown would have to prove that the nature and circumstances of the discharge caused impairment or had the potential to cause impairment. This would require the crown to prove that the quantity of the material discharged, the concentration and the duration were such that it could cause water impairment.

The Inco case created a major loophole for water pollution laws in Ontario. The reason for this is that most contaminants, when they are discharged into water, will dilute. So by the time the ministry investigators become aware of the discharge and are able to attend at the scene, much of the evidence will have disappeared. It would make it difficult if not virtually impossible to secure a conviction. So currently in Ontario, we have a major loophole—I would say it's a gaping hole—with respect to water pollution laws. This bill fixes that.

Mr. Barrett: Thank you to the Canadian Environmental Law Association. You mentioned that, in CELA's view, there is no legal rationale to treat air pollution differently from water pollution or pollution to the land. Is there an issue at all with the fact that MISA companies have now become the focus of this legislation and not other companies?

Secondly—I don't know whether it relates—Justice O'Connor and source water protection: That legislation was promised last year. We aren't going to get it in this session; I don't think we'll get it this week. Again, should distinctions be made on source water protection? Should it not apply just to MISA companies? I just wonder if you could comment on that.

Ms. Nadarajah: Obviously not. I feel absolutely hopeful that the government will follow through on the source water protection. That was one of the key recommendations of Mr. Justice O'Connor. But there is no reason, from our standpoint, why you would want to limit that to MISA facilities. While they may in fact, as I think Minister Dombrowsky mentioned, be the major cause of spills in Ontario, the reality is that small companies as well cause spills into the environment. It's not just the quantity of spills; I would submit that you need to focus on the type of contaminants that are spilled as well. Our hope would be that this bill would apply to all companies operating in Ontario that have the potential to cause spills.

Mr. Barrett: Bill 133 or source water protection?

Ms. Nadarajah: Both.

Mr. Marchese: You've answered two questions that I had in mind that both would have been brief. My last question: Do you anticipate any changes today by way of amendments?

Ms. Nadarajah: We would certainly hope not. As I indicated, our support of this bill is contingent on there being no further government amendments which would weaken any of its provisions.

The Chair: Thank you very much for coming in today.

CANADIAN MANUFACTURERS AND EXPORTERS

The Chair: Canadian Manufacturers and Exporters. Good morning and welcome. You have 10 minutes today. If you leave any time remaining, we'll use it for questions divided among the parties. Please begin by stating your name for the purposes of Hansard, and continue.

Ms. Nancy Coulas: Hi. I'm Nancy Coulas, and beside me is Lisa Kozma. We represent Canadian Manufacturers and Exporters. We were pleased to have the opportunity to present to this committee on May 16, and I'd refer you to our submission dated May 16 for general information about our organization and for information about our major concerns with Bill 133, as it was written prior to first reading.

CME has had the opportunity to review the amended version of Bill 133 and we're pleased that the government has dealt with and clarified a number of unintended consequences of the bill. We appreciate the efforts of this committee in that respect. However, some serious issues remain. We're pleased to have the opportunity today to outline these matters with the committee.

One of the most significant outstanding concerns CME has with the bill is regarding the application of a reverse onus to prosecutions of directors and officers where there could be significant fines and jail terms. This is a matter of fundamental civil liberties. The principle that has guided legislators in Canada throughout the years is that where an accused faces serious penalties, including incarceration, the crown should bear the burden of proof. Removing this reverse onus from the bill would in no way detract from the basic principles that underlie the bill, but it would bring it more closely into line with Canadian legal tradition.

If this issue is viewed as a policy issue, as opposed to a question of legal interpretation, CME is concerned that this is a policy issue that has application far beyond the Ministry of the Environment and the bill that is currently before this committee. For example, the Ontario Occupational Health and Safety Act contains an analogous duty for officers and directors of a corporation, but this piece of legislation does not specify a reverse onus.

The bill clearly expands the existing duty of directors and officers with respect to environmental matters. Removal of the reverse onus clause would not detract from the positive effects of the proposed bill.

Below is a summary of the key outstanding issues that CME would like to raise with respect to Bill 133. We believe the amendments suggested below are essentially technical in nature and do not undermine the substance of the bill. They are, however, of serious consequence to CME members.

The first issue we have is reverse onus on appeals of provincial officer orders relating to discharges, section 145 of the Environmental Protection Act and section 102 of the Ontario Water Resources Act.

The bill still proposes that a reverse onus apply to both the appeal of environmental penalties and the appeal of provincial officer orders relating to discharges. This reverse onus for appeal of provincial officer orders may have some unintended consequences. Under the currently proposed wording, the appellant of a provincial officer order relating to discharges would still have the obligation to prove certain matters that, but for Bill 133, would be the obligation of the provincial officer to prove. The effect, where the "may" threshold applies to such orders, would be to make it very difficult for industry to appeal orders which require the implementation of expensive alteration to plant and equipment where such orders "may, or may not" have any positive environmental impact. CME proposes eliminating subclause (ii) of the proposed section 145 of the EPA and section 102 of the Ontario Water Resources Act, and thus the reverse onus would apply only to environmental penalties.

The second issue is reverse onus for directors and officers under section 194 of the EPA and section 116 of the Ontario Water Resources Act.

As we noted earlier, the bill proposes that directors and officers should have the onus of proving that they took all reasonable care to prevent the corporation from committing certain offences. The failure to take all reasonable care on the part of a director or officer is the very core of the offence created under section 194 and is therefore a reverse onus. Such a specific reverse onus is of particular concern in a quasi-criminal matter that may attract both significant fines and jail sentences. CME proposes deleting the proposed subsection 194(2.1) of the Environmental Protection Act and subsection 116(2.1) of the Ontario Water Resources Act. The environmental duty of directors and officers has been expanded by the bill. The reverse onus should remain a legal matter to be determined by the courts. The deletion of the reverse onus will not detract from meeting the policy objectives of the bill.

The third issue: The "may" versus "likely" threshold in provincial officer orders in relation to section 14 contraventions of the Environmental Protection Act, section 157. By allowing provincial officer orders to be issued in any case where an environmental penalty could be issued in respect of a section 14 contravention, the "may cause" threshold effectively applies to provincial officer orders, but only for regulated persons. This therefore creates a two-tiered approach to environmental regulation, with different thresholds applying to different parties. With the reverse onus referred to in the first item, it makes it effectively impossible for the recipient of such an order to be successful in an appeal of such an order.

CME recommends deleting clause (a) of subsection 157(1.1). Alteration to plant and equipment should only be required by provincial officer order where such an alteration is to prevent discharges that cause or are likely to cause an adverse effect, not discharges that may cause an adverse effect.

Fourth issue: changes proposed to the definition of "deemed impairment" in section 1 of the Ontario Water Resources Act. Two paragraphs of the definition of "deemed impairment" were changed by the government

motions and are therefore a new concern for CME. While the definition of "deemed impairment" is very broad, the addition of clause (e), regarding peer-reviewed articles as proof of impairment, to the definition is particularly disturbing. It significantly changes the evidentiary issues in relation to deemed impairment. While this amendment may have been intended to create greater scientific certainty, it appears to have the potential for the unintended consequence of doing the reverse. Any peer-reviewed article from any jurisdiction—notwithstanding other, more current information or perhaps other peer-reviewed articles to the contrary—could potentially be used to determine impairment. CME recommends this paragraph be deleted.

Thank you again for the opportunity for CME to present its views on these important issues. We appreciate the efforts of this committee to make improvements to Bill 133, and we hope the committee will take advantage of this opportunity to make further improvements that will bring the legislation into closer alignment with Canadian legal tradition. As an integral part of the communities in which we live and work, CME and our member companies fully support protecting Ontario's environment, and we appreciate this opportunity to share our views with you.

The Chair: We should have time for one question.

Mr. Barrett: I wish to thank Canadian Manufacturers and Exporters for your participation and the work that you have been doing on this.

This winter, I was getting phone calls about this legislation. I remember one call where the owner of a company phoned me. He was involved in environmental industries, taking in plastic and solving environmental problems, but his concern was where this would leave his company. Most of the stuff he brings in comes from Ohio. He said he could do this just as easily in Ohio, and was suggesting, the way it was going originally, that this would be something he would consider. Do you feel that, with the many amendments, this bill is coming around now; that it would not, at minimum, create any kind of competitive disadvantage, say with the state of Ohio or with Michigan, a US jurisdiction? Any comparison with what's going on across the border as far as this kind of legislation is concerned?

Ms. Lisa Kozma: It's difficult to speak to that issue right now, because a lot of the substantive matters in this bill are going to be addressed in regulation, particularly when we deal with the environmental penalty provisions. I guess, at this stage, we're hoping we can work effectively with all the other stakeholders to come up with an environmental penalty regime that does in fact create certainty for business. I would say that one of the major issues was the "may" threshold as applied to the Environmental Protection Act and the concern among industry that this would create great uncertainty as to what the threshold actually was. The government and this committee have made efforts to address that issue. Aside from the two points we brought up here—the reverse onus and the "may" threshold for provincial officer orders—I think those issues have largely been addressed.

The Chair: Thank you for coming in with your deputation this morning.

Ontario Bar Association, environmental law section, please.

Mr. Marchese: Nobody's here.

The Chair: Ontario College of Family Physicians: Are they here?

This committee will stand in recess for 10 minutes. We'll reconvene shortly before 11:05 for the Ontario College of Family Physicians.

The committee recessed from 1055 to 1116.

ONTARIO COLLEGE OF FAMILY PHYSICIANS

The Chair: The committee will reconvene and come to order.

Welcome. I hope you had a pleasant ride here.

Dr. Riina Bray: Don't get me started. I couldn't park the car. That's why I'm late. I'm sorry.

The Chair: Take your time; catch your breath. You have 10 minutes before us today. Begin by stating your name for the purposes of Hansard and proceed.

Dr. Bray: My name is Riina Bray. I'm a family physician, assistant professor at the Environmental Health Clinic at Sunnybrook and Women's College Health Sciences Centre. I'm also chair of the environmental health committee at the Ontario College of Family Physicians.

I much appreciate the opportunity today to address this committee on the important issue of Bill 133.

In its final report on spills, the government's Industrial Pollution Action Team dispelled any myths about Ontario's international leadership in this arena by concluding, "It was our impression that Ontario's regulatory system has not kept pace with progressive jurisdictions elsewhere in the world, which employ a more diverse management tool kit and a risk-based approach."

The action team's report also stated that there is a need for substantive change in Ontario's environmental management framework, and that "despite its best intentions, the current system does not encourage pollution or spills prevention."

These spills are often referred to as "environmental contaminants," but please remember that they are also human contaminants. Physicians tend not to use such terms, so I'd like to speak plainly about the topic at hand. What we're talking about in most cases here are poisons, and it's important not to forget that.

In his submission to this committee, Dr. David Colby, the medical officer of health for Chatham–Kent, told you that Bill 133 is essential to improving the health and safety of his community. There is certainly an immediate impact on southwestern Ontario because of the preponderance of spills, but this bill affects or has the potential to affect our patients throughout the province.

Much has been made of the inequitable financial burden that environmental penalties place on industrial facilities, but although physicians' primary interest is in

the health of our patients, it is important for you to know that there are two sides to this cost argument as well.

As the action team's report stated, "Downstream communities are not recouping the full costs of spills."

When public health warnings such as boil-water advisories are issued, expenses are immediately incurred. Even when there are no such warnings, parents, concerned for their children's well-being, take precautionary measures, like drinking only bottled water, when there is news of a spill or when spills are frequent. They too incur immediate costs. It is also likely that a populace more fearful of environmental contamination is more costly to government because they more frequently seek medical attention from their physicians and other health care providers.

In addition to this, there's a huge hidden cost that will present itself later on with the impact of contaminants on unborn children, pregnant women and young children who experience exposures which can manifest later with neuro-behavioural problems, costing billions of dollars to the nation. This has been shown in many scientific reports that are available.

Also, cancers from chronic exposure to contaminants in the young and in the old obviously pose a huge health care cost to our country.

Also, we must consider the immuno-compromised, the infirm, the elderly and those suffering from reproductive problems, and the link that has been shown there with contaminants.

On the topic of added governmental costs, it is certainly the case that significant improvements to spills notification systems and response systems, which have predictive capacities to identify specific public health vulnerabilities, all cost a lot of money, too.

Tracking health threats once they exist is absolutely important, but it is certainly better and cheaper to prevent spills in the first place. I learned a long time ago that preventive medicine is a much healthier approach than waiting to develop a treatment strategy once the threat has been introduced, be it a disease or a chemical contaminant. It's also much cheaper.

Honourable committee members, we understand that the government is required to balance the interests of many when making legislative decisions. Just to clarify, that is not to say that we think health interests are special interests, as some would suggest; although it is my view that health interests should be treated more specially than some industrial interests.

To the business at hand: It is obvious that some companies are not complying with Ontario's environmental laws. As well as threatening their surrounding communities and potentially those far downstream, this non-compliance gives the lawbreakers an unfair advantage over their competitors who do comply. Environmental penalties send the message to those who haven't gotten it yet that compliance is the bare minimum of acceptability and that there is a cost and a consequence for not living up to the law.

As a physician, I cannot claim to be an expert in legal compliance issues, but it is clear to me that enforcing compliance is a move in the right direction toward protecting the health of our patients.

We think that the current amendments to Bill 133 from the second reading last week are a reasonable balance of interests, and I would like to support the bill in its amended form.

As Dr. Colby reminded this committee, spills cannot be the cost of doing business; protecting the health of Ontarians must come first.

Thank you for the opportunity to speak today.

The Chair: Thank you for coming in. We should have an opportunity for a question from each caucus to you, beginning with Mr. Marchese.

Mr. Marchese: Thank you, Dr. Bray, for coming.

The Chair: Mrs. Van Bommel.

Mrs. Maria Van Bommel (Lambton–Kent–Middlesex): Thank you, Chair, and thank you for coming in. I hope that you catch your breath. You still sound a bit out of breath.

You mentioned the Industrial Pollution Action Team and the recommendations that they made. One of the things that we've heard since then are concerns that industries in the Sarnia area have expressed about having to comply and the comments that they've made about having to leave the area if they have to comply with certain restrictions. They're talking about moving to other jurisdictions, including other provinces in Canada. With that comes the concerns about jobs. How would you address that kind of thing?

Dr. Bray: I get a lot of dialogue coming from Sarnia with regard to environmental contaminants and illness and disease. If they want to move elsewhere, then kudos to them.

I think we need to think of the health care costs, because if you look at the epidemiology right now and the illness that is hitting Sarnia—I don't know if you know, but Sarnia is it's a particularly sick community. We get patients who are very, very disabled coming from that area. There are studies showing that childhood illness and cancers are much higher geographically than the rest of Ontario. It's a sick community, and I would say that, dollar for dollar, you're going to save money in the end.

Jobs are important, but when you think of the future generations and the unborn etc., I really don't think we should be making a comparison there. If you want to, I would say that I think we need to put the health of people first, and jobs will come second. Otherwise, people are going to have jobs and then they'll have to go on disability or they're going to lose loved ones. The cost of suffering is going to be huge. There have to be alternatives for them.

The Chair: Thank you very much. Mr. Miller.

Mr. Miller: Thank you for coming in today. You mentioned at the beginning of your talk, the report of the Industrial Pollution Action Team. In that report it said, "Despite its best intentions, the current system does not encourage pollution or spills prevention, or the regular updating of technology and operating systems."

I think that you also went on to say that you believe in preventive medicine, if I heard you correctly.

We've also heard from industry here today that they would like to see more science-based and risk-based provisions in this bill.

Do you think we should be doing more to encourage spills prevention and pollution prevention plans?

Dr. Bray: Yes, I do. I think you can do more studies, I think more studies are always warranted, but you have to be careful and consider the precautionary principle. It doesn't require too much thought when you have a mass balance and you look at what's going into the environment. It has to go somewhere, and you just sort of follow it through.

I think that scientific investigation shouldn't be an excuse to continue doing what they're doing. It shouldn't be something that prevents them from making the correction sooner than later. I think of the precautionary principle again here.

The Chair: Thank you very much for coming in. I'm sorry that you had a wicked commute, but you did have the last word today.

Dr. Bray: Thank you, and I hope I've been helpful.

The Chair: This committee stands in recess until clause-by-clause consideration of Bill 133 today at 4 p.m. in this room.

The committee recessed from 1127 to 1602.

The Chair: Good afternoon and welcome back from our recess. This is the standing committee on the Legislative Assembly. We're here for the consideration of Bill 133, An Act to amend the Environmental Protection Act and the Ontario Water Resources Act in respect of enforcement and other matters.

Just before we get to our very full agenda with the clause-by-clause, are there any motions?

Mr. Miller: Mr. Chair, I have a motion.

I move that the subcommittee on committee business be authorized to consider and approve the attendance of a committee delegation at the 2005 annual meeting of the National Conference of State Legislatures, subject to budgetary approval; and further, that the subcommittee be authorized to approve a committee budget for submission to the Speaker and the Board of Internal Economy for their approval.

The Chair: Discussion? Carried? It's carried.

The standard question that the Chair is required to ask: Are there any comments, questions or amendments to any section of the bill and, if so, to which section?

Mr. Barrett: By way of comment, we have before us not the original version of Bill 133. In hearing testimony and listening to debate on Thursday afternoon on second reading, I would think that people concerned—environmental groups, industry coalitions—would see some changes that they would approve of and some that they would be disappointed in. I think that stakeholders and people who have testified would feel that their concerns are not so much about penalties or the principle that those organizations or companies that do pollute or spill should pay. No one argues against that; that's a motherhood issue. The industry does not argue against that, or other organizations. The PC opposition does not argue against that.

Our Minister of the Environment, in Thursday's second reading debate, said, "We believe that if the private sector spills, they should pay for its cleanup, not the taxpayers of Ontario." She went on to say, "Obviously, the opposition is in favour of polluters." I don't know where that comes from, because everyone agrees, including the opposition, that the polluter pays. The concern is, when do you pay? Under what conditions? Where is the evidence? Do you pay just when government asks you to pay, regardless of any best practices that have been followed by the organization, or regardless of the impact on the environment or any scientific measure of the impact on the environment?

Certainly, the regret continues that the original bill was introduced without any meaningful consultation. It has become divisive. For some, it is seen as being antagonistic. For others, it's seen as disappointing at best. There is regret that there was not a gathering around the table, if you will, a search for some common ground very early in the game or, at minimum, at any time, say a year and a half ago, when the spills on the St. Clair first triggered and caused this reaction seen in this legislation.

I do acknowledge that some stakeholders have indicated to me that they appreciate the efforts of this committee. They have made it clear, even at this date, and we heard this this morning, that there are some serious issues that remain. This is not the kind of legislation that they envisioned would come out of a response to a need to have a better way to not only deal with spills after the fact—that one's fairly clear cut—but a better way to prevent spills from happening in the first place, to monitor spills and to have better systems in place for rapid response and remediation.

To my mind, in my discussions over the last several months, people agree polluters must pay. They're just asking for legislation that would be workable and is in the best interests of everyone, whether they've taken sides on the environmental side or the industrial side, something that works for people in the province of Ontario.

The Chair: Any further comments before we go into clause-by-clause consideration?

Mr. Wilkinson: I just want to put on the record how much the government appreciates, in this process on Bill 133—we took a step which I think has been unusual in the past but hopefully will be used more in the future, where we take a substantive bill like this and get it out to committee after first reading. I think we'll all be glad to say, at the end of the day, that the bill has been substantially improved by working together collaboratively.

Mr. Marchese: I hope this practice doesn't happen too often. In fact, I'll be speaking to that in the Legislature when we debate third reading of this bill. I think that when you introduce a bill and you have consultations with people, you then introduce the best possible bill you can, after those consultations. To introduce a bill with

consultations, then move it from first reading to second reading in committee to hear people again, make amendments and bring it back for third reading, hearing people again and making other amendments—in this case there are no amendments, other than this one amendment the Conservatives are bringing forth. It's just a problemo, in my view. I don't recommend it as a process. I hope it never happens again.

The Chair: Thank you all for you comments. The Chair observes that the goodwill and the high degree of decorum throughout the hearings by all parties and by the deputants, and certainly throughout the clause-by-clause, has made the process, at least, a pleasure to conduct.

Shall we consider section 1? There have been no amendments proposed to section 1. Shall section 1 carry? Carried.

Are there any amendments to section 2?

Mr. Barrett: There is. Committee, I do have an amendment on page 44(e) and I do have the amendment. Is this the appropriate time to go to page 44?

Interjection: It's your big moment.

Mr. Barrett: I just want to make sure. It's a PC motion.

I move that clause 1(3)(e) of the Ontario Water Resources Act, as set out in subsection (2) of the bill, as the bill was amended after first reading, be struck out.

By way of discussion, this morning we actually received input. There was some commonality of concern amongst not only the Canadian Manufacturers and Exporters but also the Ontario Mining Association. We also received concerns from the Coalition for a Sustainable Environment. For example, the Canadian Manufacturers and Exporters indicated there are two paragraphs of the definition of "deemed impairment" that were changed by government motions and are therefore a new concern:

"While the definition of 'deemed impairment' is very broad, the addition of paragraph (e)"—which the committee will see on page 44—"('peer-reviewed articles as proof of impairment') to the definition is particularly disturbing and it significantly changes the evidentiary issues in relation to 'deemed impairment.' While this amendment may have been intended to create greater scientific certainty, it appears to have the potential for the unintended consequence of doing the reverse. Any peer-reviewed article from any jurisdiction, notwithstanding other more current information or perhaps other peer-reviewed articles to the contrary, could potentially be used to determine impairment."

That was one organization that recommended that that paragraph be deleted.

Dr. Surplis this morning addressed the issue as well, and just give me a second. I know they had a number of concerns and in the short time available today we decided to focus on this one just because there were at least three organizations as late as this morning that asked that this be dealt with.

The coalition also, as they say, has great difficulty with this definition of "deemed impairment," and here again, they believe that it has "unintended consequence in that anyone, with or without expertise or authority, could use this definition for their own purposes in a fashion not at all consistent with government policy."

We also know that on both days of testimony the Ontario Mining Association presented their concerns on this. I don't know whether Mr. Miller wants to address that issue.

Mr. Miller: Certainly. We did hear from a number of groups this morning that had concerns with the definition of "deemed impairment" and, as has been pointed out, there may be some unintended consequences with the way it is currently put forward. That is why, in the short time that we've had since this morning, we have this amendment to delete that one clause from the bill. I would simply like to say that I believe the Ontario Mining Association would like you to go further than that, but in the short time frame we have had from noon until now, we really haven't had enough time to make further amendments. But the Ontario Mining Association is concerned that this definition of "deemed impairment" could have consequences for the mining industry, where other waters could be considered to be discharges.

So I think further study of this, as it relates to mining, is necessary, and we just haven't had time in the short time since noon to make further amendments to address some of the concerns of the mining industry.

Mr. Barrett: Further to that, Chair, I know that not only this morning, but in previous testimony which was by Chris Hodgson, as I recall, of the mining association, they were concerned that the definition of "deemed impairment" is much more stringent than the existing wording.

The proposed wording would include the test for any organism, whether or not that organism lives in the habitat. In essence, it appears that the government is trying to say that even the discharge of non-inherently toxic substances will be prohibited. They feel that this is impractical, certainly specifically within the mining industry, and argue that the general public would understand that it's impossible to implement in the real world and, by extension, unnecessary to implement in the real world.

They give the example of how it's problematic. Just for their industry, every bit of seepage from a rock pile could be considered an offence, because it would contain metal. There would be no consideration as to whether or not the seepage could or would cause an adverse effect. I think they're indicating that that's part of the nature of mining and searching for metal.

The Chair: Further questions and comments?

Mr. Wilkinson: In regard to the amendment, I find it somewhat incomprehensible. I'm just confused here. We went through the whole process about review of this bill, and industry was very, very clear to us that the current clause (e), as proposed, did not clearly define "science."

If I remember correctly—and this is the motion that we struck down—it was to have said, in regard to deemed impairment:

"(e) the material or derivative may cause injury to or interference with any living organism in any water."

That was amended by us, after listening to industry, to "peer-reviewed scientific publications indicate that the material or derivative causes injury to or interference with organisms that are dependent on aquatic ecosystems."

We amended this bill, listening to industry, by saying, "That's much too broad. If you're going to talk about science, then define science." A reasonable definition of "science," it's my understanding, from a judicial point of view, is things that are peer-reviewed, because they are actual science. In the peer-review process, you don't just write a paper, you don't get to publish it unless it's been reviewed by your peers to make sure that they agree—they may not agree with the premise—that the scientific method that was applied to it was correct.

Now I'm really confused, because I thought that we did a good job by making sure that things would be peer-reviewed, and now we have an amendment from the opposition that says, "Let's just strike out (e). Forget about (d) and (f), because they had concerns about that as well. We're just going to take out that scientific basis." It strikes me that that would substantially weaken the bill in regard to deemed impairment.

As we heard from Ms. Ginsburg, in the case of the Ontario Water Resources Act, prior to the Bata case, this was not an issue. What Ms. Ginsburg talked about was the fact that if something is spilled in the water, the evidence is diluted, the evidence doesn't exist.

As we've said in our bill, the person who is responsible for knowing what is discharged would be the company. The question then comes down, in my opinion, to what is a reasonable test? This is all about going back to the status quo before Bata, and it is about making sure, by setting that standard, that it is one based on science.

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I have no doubt that a judge—we don't just let anybody be a judge—could look at the evidence and be able to weigh peer-reviewed science in his or her determination of this case. We've decided in our society that that is who gets to decide these matters. So we are in agreement with our amended motion and will be voting against this amendment.

The Chair: Further questions and comments?

Mr. Miller: I would just like to point out to the parliamentary assistant that point (d) of the amendments does still include a scientific test: "(d) a scientific test that is generally accepted as a test of aquatic toxicity indicates that the material or derivative, in diluted or undiluted form, is toxic." So that scientific test still exists.

As was pointed out by the groups that came before us this morning, they're concerned that any peer review or article from any jurisdiction, notwithstanding other more current information or perhaps other peer-reviewed articles to the contrary, could potentially be used to determine impairment, and they're concerned that it could actually be used in a way that doesn't establish the science.

Mr. Wilkinson: I would leave it in the good hands of the judge to decide what is the most current science which has been peer-reviewed. Really, the Legislature is giving him or her direction as to how to make that judgment.

Mr. Marchese: I agree with John. Let's go for the vote.

The Chair: Shall the amendment carry? All those in favour? Those opposed? I declare the amendment lost.

Shall section 2 carry? Carried.

Shall section 3 carry? Carried.

Shall section 4 carry? Carried.

Shall the title of the bill carry? Carried.

Shall Bill 133 carry? All those in favour of the carrying of Bill 133? Those opposed? Carried.

Shall I report the bill to the House?

Mr. Miller: Excuse me. I just wanted to get on the record the fact that many of the groups that have come before us have asked that there be some way that they can review the regulations as this bill goes forward, because a lot of the detail certainly will be in the regulations. I think it's a flaw in the process, in many cases, with many of our bills, in that the bill passes but most of the detail is in regulations and those most affected by the regulations don't necessarily get to give their input. I note that many of the groups—certainly business—said that they would like some opportunity to make comment on the regulations.

Mr. Marchese: I wonder whether Mr. Miller agrees that the environmental groups should be part of that consultation, in the event that they do that.

Mr. Miller: Yes, I totally agree.

Mr. Wilkinson: Again, just for the record, of course in Ontario, in our jurisdiction, we have the Environmental Bill of Rights registry. Any regulation contemplated by the government—no matter what the government of the day—has to be posted, and there is a consultation process there. But I do take the suggestion of my friend from Parry Sound–Muskoka. I'll make sure that's passed along, because many people did say that they have a keen interest in the regulations.

Mr. Barrett: Just further to Mr Marchese's comments, by all means we wish to have all and sundry at the table—industrial, environmental—and not just posting it on the Environmental Bill of Rights registry, which very few people in my riding know about or know how to access. We're talking about true consultation. We're talking about citizen participation, where people sit around a table and there's perhaps some travel, something akin to what we saw a number of years ago with the regulations, let alone the legislation, around nutrient management; not just a posting on the EBR, where those who know about it type something in return. I'm talking about citizen participation in a broader sense.

The Chair: Shall I report the bill to the House? All those in favour of reporting the bill to the House? Those opposed? Carried.

These hearings are adjourned.

The committee adjourned at 1624.

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