

# **Environmental Impact Statements Under the City of Winnipeg: Present Law, Proposed Amendments, Commentary**

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1974

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**The Institute of Urban Studies**





THE UNIVERSITY OF  
WINNIPEG

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**ENVIRONMENTAL IMPACT STATEMENTS UNDER THE CITY OF WINNIPEG: PRESENT LAW,  
PROPOSED AMENDMENTS, COMMENTARY**

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SUBJECT: Environmental Impact Statements under  
the City of Winnipeg Act.

CONTENTS: Present Law  
Proposed Amendments  
Commentary

PREPARED FOR: Committee Reviewing City of Winnipeg Act

PREPARED BY: The Institute of Urban Studies  
University of Winnipeg  
David Miles [1976]

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SECTION 653 UNDER THE PRESENT  
CITY OF WINNIPEG ACT  
ENVIRONMENTAL IMPACT REVIEW

**Executive policy committee to consider effect of a public work.**

**653 (1)** In addition to the duties and powers delegated to the executive policy committee by this Act or by council, the committee shall review every proposal for the undertaking by the city of a public work which may significantly affect the quality of the human environment and shall report to the council before such work is recommended to council on,

- (a) the environmental impact of the proposed work;
- (b) any adverse environmental effects which cannot be avoided should the work be undertaken; and
- (c) alternatives to the proposed action.

**Written report to council.**

**653 (2)** Prior to a time in 1973 fixed by council and thereafter annually, the executive policy committee shall present a written report to the council concerning the work of the committee under subsection (1) to the end of the preceding December.

**Definition of "public work".**

**653 (3)** In this section "public work" does not include the maintenance of streets, parks, boulevards, water systems, sewer systems, electrical utilities, or buildings or appurtenances thereto owned or occupied by the city.

En. S.M. 1974, c. 75, s. 1.

**Deemed compliance with subsection (1).**

**653 (4)** Where, after January 1, 1972, a public work has been undertaken following the approval of a proposal therefor by The Clean Environment Commission under The Clean Environment Act, subsection (1) is deemed to be satisfied for all purposes.

En. S.M. 1974, c. 75, s. 1.

S.M. 1971, c. 105, s. 653; Am. S.M. 1974, c. 75, s. 1.

SECTION 653 - PROPOSED AMENDMENTS

653 (1) In addition to the duties and powers delegated to the Executive Policy Committee by this Act or by council, the committee shall review every proposal for the undertaking by the City of a public work or action<sup>1</sup> which may significantly affect the quality of the human environment and shall provide to the council before such work or action is recommended to council by any person or committee a detailed statement<sup>2</sup> on

- a) the environmental impact of the proposed work or action;
- b) any adverse environmental effects which cannot be avoided should the work or action be undertaken; and
- c) alternatives to the proposed work or action.

653 (2) In addition to the duties and powers delegated to the council by this or any other Act, the council shall receive and consider before undertaking any work or action which may significantly affect the quality of the human environment the detailed impact statement provided to it by the Executive Policy Committee pursuant to s.s. (1).<sup>3</sup>

653 (3) The Community Committees in carrying out their

1 See commentary p. 10 - 14

2 See commentary p. 9 & 10

3 See commentary p. 6 - 9

653 (1)  
modified

new section

page two

responsibilities pursuant to s. 24(1)(b) of this Act shall be provided with any Environmental Impact Statements prepared pursuant to s.s. (1).

653 (4) The Standing Committee in carrying out its responsibilities pursuant to s. 36 (c) of this Act shall be provided with any Environmental Impact Statements prepared pursuant to s.s. (1).<sup>1</sup>

653 (5) The Executive Policy Committee may order the proponent of any work which may significantly affect the quality of the human environment to prepare and file with the Executive Policy Committee a detailed Environmental Impact Statement outlining the environmental effects of the proposed work and the Executive Policy Committee may order the proponent to comply with Report 1338/74 and amendments thereto.<sup>2</sup>

653 (6) Notwithstanding that all other provisions of this Act and any other Act are complied with, the Executive Policy Committee may direct that a building/<sup>or demolition</sup> permit be withheld from any person ordered to file an Environmental Impact Statement under s.s. (5) until such time as the report may be filed and considered by the Executive Policy

<sup>1</sup> See commentary p: 4-6  
<sup>2</sup> See commentary p: 14

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Committee and council. The Executive Policy Committee may also direct that a building permit be withheld for an additional sixty days and the City of Winnipeg is not liable for any damage suffered by any person occasioned by the Executive Policy Committee exercising its discretion under this section.<sup>1</sup>

653 (7) Prior to a time in 1973 fixed by council and thereafter annually, the Executive Policy Committee shall present a written report to the council concerning the work of the Committee under s.s. (1) to the end of the preceding December.

653 (8) To advise and assist the Executive Policy Committee in the carrying out of its duties and powers under this section, a Review Board shall be established.

653 (9) The Review Board shall consist of six members and shall be constituted as follows:

The Executive Policy Committee shall appoint three members from the administration and three from a list of nominees submitted to it by the Resident Advisory Groups. Each Resident Advisory Group shall nominate one person to that list.

1 This section is designed to give council time to consider purchase, zoning or expropriation proceedings.

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653 (10) The Review Board shall review every proposal by the City for the undertaking of a public work or action which may affect the quality of the human environment and recommend to the Executive Policy Committee as to the necessity of submitting that work or action to an Environmental Impact Statement.

653 (11) The Review Board shall review every Environmental Impact Statement prepared pursuant to this section and recommend to the Executive Policy Committee as to its adequacy.

653 (12) In order to fulfill its function, the Review Board shall have the power to convene public hearings or meetings, conduct perception and attitude surveys or devise any other practical method to determine public response.

653 (13) The Review Board shall be provided with adequate funds with which to carry out its function.<sup>1</sup>

653 (14) In this section, public work or action includes any project, activity, structure, undertaking, policy, legislative proposal or programs and includes the abandonment, demolition, removal and rehabilitation stages thereof

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1. See commentary p. 27 \* 28



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and without limiting the generality of the foregoing includes:

- ew section
- i) actions undertaken by a person which are supported in whole or in part through contracts, grants, subsidies, loans, mortgage and loan guarantees, or other forms of assistance from the City of Winnipeg.
  - ii) actions involving the issuance to any persons of a lease, permit, license, certificate or other entitlement excepting the issuance of permits or licenses over which the City of Winnipeg has no discretion<sup>1</sup> but does not include the maintenance of streets, parks, boulevards, water systems, sewer systems, electrical utilities, or buildings or appurtenances thereto owned or occupied by the City.<sup>2</sup>

653 (8)  
modified

653 (15) For the purposes of this section, maintenance is to include preservation and upkeep but not improvements.<sup>3</sup>

653 (16) Where, after January 1, 1972, a public work has been undertaken following the approval of a proposal therefor

1 see commentary p. 12 - 14  
2 see commentary p. 16 - 18  
3 see commentary p. 17 & 18

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by the Clean Environment Commission under the Clean Environment Act, s.s. (1) is deemed to be satisfied for all purposes.<sup>1</sup>

Former  
S. 653 (4)

653 (17) Notwithstanding s. 653 (16) where after January 1, 1976, a public work or action is submitted for approval to the Clean Environment Commission and where the submission includes a detailed impact statement of that work or action s.s. (1) and (2) are deemed to be satisfied for all purposes.<sup>2</sup>

New section

653 (18) Report 1338/74 and subsequent amendments are binding on the City and all other persons required to prepare impact statements under this Act and shall be given the same effect as if it were a provision of this Statute.<sup>3</sup>

New section

653 (19) Notwithstanding any other Act, an appeal under this section may be made on questions of law or fact or both and the Court may affirm or may rescind any decision of the Executive Policy Committee and may direct the Executive Policy Committee to take any action which the Executive Policy Committee may take and as the Court considers proper and for such purposes the Court may sub-

New section

1 see commentary p. 14 - 16, 18 & 19

2 see commentary p. 18 & 19

3 see commentary p. 20 - 29

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stitute its opinions for that of the Executive Policy Committee or the Court may refer the matter back to the Executive Policy Committee with such directions as the Court considers proper.<sup>1</sup>

653 (20) Notwithstanding s. 654 (19), the Court does not have the power to direct or reverse a decision of the Executive Policy Committee to recommend to council that an action should or should not be undertaken.<sup>2</sup>

653 (21) Any person shall have standing to appear before the Executive Policy Committee or to make application to the Executive Policy Committee in regard to any matter over which the Executive Policy Committee has jurisdiction including the right to attend in person, to participate in any hearing or meeting, to be represented by agent or counsel, and to cross-examine witnesses, and any person shall have standing to commence and prosecute court proceedings under this section if that person is a resident of the City of Winnipeg.<sup>3</sup>

1 see commentary p. 29 - 35

2 see commentary p. 34 & 35

3 see commentary p. 35 - 37

New section

PROPOSED AMENDMENTS TO S. 653: COMMENTARY

Introduction

S. 653 of the City of Winnipeg Act which imposes an obligation on the Executive Policy Committee to "review every proposal for the undertaking by the City of a public work which may significantly affect the quality of the human environment and to report to council before such work is recommended to council on

- a) the environmental impact of the proposed work;
- b) any adverse environmental effects which cannot be avoided should the work be undertaken; and
- c) alternatives to the proposed action."

is unique in Canada. Modelled after the United States National Environmental Policy Act the legislation obviously intends that council should be aware of the environmental effects of a public work prior to deciding whether or not said work should be undertaken.

This legislative enactment has been subjected to considerable verbal abuse by both administrators and councillors of the City. In fact, at the insistence of City council, it was amended by the Provincial Government to exclude from its scope certain types of projects and more recently the Executive Policy Committee in its report to

page two

City council on February 19, 1975 strongly recommended:

" that the official delegation of the City approach the Provincial Government requesting that this section of the Act be repealed in its entirety and that the Provincial Government, in conjunction with the City, review all implications of Environmental Impact Reviews with a view to establishing in the future a more adequate legislative framework for the protection of the urban environment."<sup>1</sup>

In addition, this report of the Executive Policy Committee to council stated: "As council is aware, it is practically impossible for the City to operate under the provisions of this section."<sup>2</sup>

In opposition to this recommendation, a number of citizens, citizen groups and institutions, including this Institute, appeared as delegations at the council meeting to praise the utility of s. 653 and plead for its retention.<sup>3</sup> Council compromised by calling for study and review of the section.

It is not the intention of this policy review to discuss in detail the case for and against environmental impact reviews. The United States experience under the

1. Minutes of City of Winnipeg Council meeting Feb.19/75
2. Supra
3. See Appendix A.

page three

National Environmental Policy Act clearly demonstrates the benefits to be derived by the adoption of a satisfactory review process. The process should result in open and responsible decision making, increased accountability of political and administrative decision makers, a more thorough understanding of the environmental consequences of complex undertakings, and a more meaningful role for individual citizens and Resident Advisors in the planning process.

Most importantly, it will insure that all factors are considered by council in considering alternative courses of action resulting in decisions which are in the best interests of the City. Thus, under no circumstances should Section 653 be removed from the Act. On the contrary, it should be strengthened to provide, in the words of the City's Executive Policy Committee, an even "more adequate legislative framework for the protection of the urban environment.

Recognizing the benefits to be gained from the adoption of a satisfactory environmental review process, several other jurisdictions are in the process of inserting Impact Statements into the decision making process. The Federal Government has adopted as a policy for all Federal departments a mandatory impact review process. The Ontario Provincial Government has circulated a Green Paper for public reaction; and the Provincial Government of Manitoba has indicated that guidelines will be issued dealing

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with the preparation of Environmental Impact Reviews before the undertaking of any Provincial project which may significantly affect the quality of the human environment.

The purpose of this policy paper is to analyse S. 653 of the City of Winnipeg Act and Report 1338/74 of the City of Winnipeg entitled "Guidelines for the Preparation of Environmental Impact Reviews under S. 653 of the City of Winnipeg Act"<sup>1</sup> and to suggest statutory changes which would overcome the defects and facilitate the operation of these enactments.

#### Requirements and Ramifications of S. 653

The section imposes a duty on the Executive Policy Committee to review the proposals which may significantly affect the environment and report to council before such work is recommended to council on the environmental effects of said proposal.

The guidelines (Report 1338/74) detail these requirements by tying the environmental review process to the procedure mandated by the City of Winnipeg Act for the formulation of the annual capital and current estimates, which is as follows:

- a) Prepared by Board of Commissioners (S.50(1)(d)).

<sup>1</sup>. See Appendix B

- b) Circulated to Community Committees (24 (1) (b) and appropriate standing committee (36 (C) for review and recommendations.
- c) Budget with recommendations referred to in clause (b) forwarded to the Executive Policy Committee (S. 32 (1)).
- d) Budget, with recommendations, referred back to Board of Commissioners for review (S.32 (1)).
- e) Budget with accompanying recommendations reviewed by Board of Commissioners who evaluate comments and recommendations of Community and Standing Committees; budget with recommendations of Board of Commissioners is presented to the Executive Policy Committee (S. 50 (1) (e)).
- f) The Executive Policy Committee offers community committees an opportunity to be heard in respect of the recommendations presented by Board of Commissioners pursuant to clause (e).
- g) Budget accompanied by reports and recommendations of Board of Commissioners forwarded to council with or without recommendation from the Executive Policy Committee (S. 31).



- h) If community committees had commented upon the Board of Commissioners' recommendations (Clause f) then the Executive Policy Committee forwards views of community committees to council with the Executive Policy Committee's recommendations thereon (S. 32 (2)).

The guidelines contemplate that all proposals contained in the capital or current budget which may/ significantly affect the environment will be subjected to an Environmental Impact Review, which will be forwarded to councillors with the budgets.

#### Recommendations

The Environmental Impact Statement should be provided not only to council but also to community committees and standing committees which are charged with the responsibility of reviewing and submitting recommendations concerning the budget. Committees should not comment on the budget without having access to environmental information.

#### Effect of Non Compliance

A basic question that must be dealt with is the

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effect of non compliance with the reporting requirement of the Act. The duty is imposed on the Executive Policy Committee, not on council. There is no statutory duty imposed on council to receive or consider an Environmental Report.

The effect of non compliance with the statutory requirement has been dealt with in two court decisions:

a) Stein v the City of Winnipeg<sup>1</sup>

Mr. Justice Freedman of the Manitoba Court of Appeal in a dissenting judgment stated that the obligation imposed by the statute is fundamental. "Without the requisite impact review the spraying project<sup>2</sup> stands unauthorized by law", states Mr. Justice Freedman. "A project launched without legal authority, indeed contrary to the express requirements of the law, should not be continued". Mr. Justice Matas, writing the majority opinion in the Stein case, did not deal with the question directly but seemed to agree with the contention of Mr. Justice Freedman.

b) Miller v the City of Winnipeg<sup>3</sup>

Harry Miller and Judy Kohnats, residents of Winnipeg's Ft. Rouge area, launched an action to prevent the City of

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1. 1974 WWR 484

2. The case involved the City's cankerworm control program.

3. Unreported.

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Winnipeg from undercaking the alignment of Wellington Crescent. The applicants claimed that the straightening of the corner would have serious environmental consequences on the neighbourhood because of the increased traffic which would result.

Mr. Justice Solomon of the Court of Queen's Bench expressed his views on the ramifications of non compliance with S. 653. He distinguishes the duty placed on the Executive Policy Committee from the duty imposed on council. He points out that there is no statutory limitation on council nor is there a prohibition placed on council from acting until it receives a report from the Executive Policy Committee. The section merely requires that the Executive Policy Committee report on the impact of the work before recommending its construction. Judge Solomon found as a fact that the Executive Policy Committee did not make any recommendation to council regarding the proposed construction project. The committee merely made available to council the minutes of its meetings without any accompanying recommendations. In the view of Judge Solomon the effect of S. 653 is as follows:

- a) It places a duty on the Executive Policy Committee not council.
- b) It does not impose any statutory requirement on council.

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- c) The legislative powers of council are not limited by statutory limitations imposed on various committees.
- d) An environmental report as required by S. 653 is not necessary if the Executive Policy Committee does not recommend the work in question to council.

This interpretation amounts to a virtual sterilization of the review process contemplated by the Act.

#### Recommendation

The Act should be amended to impose a statutory duty on council to receive and review an impact report on all public works which may significantly affect the environment prior to any decision on said work.

#### Written Report Not Required

The Executive Policy Committee shall report to the council before such work is recommended to council on:

- a) the environmental impact of the proposed work;
- b) any adverse environmental effects which cannot be avoided should the work be undertaken;
- c) alternatives to the proposed action.

There is no duty placed on the Executive Policy Committee to draft a written report. The requirements of the statute may be fulfilled by reporting orally on the environmental effects. The heading of S. 653 reads

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"Environmental Impact Review" and the Guidelines on page 1 state: "Section 653 requires that an Environmental Impact Review be prepared to assess the potential effects of certain public works proposed by the city". It is suggested however, that these words have little, if any, legal effect.

Recommendation

The words used in the National Environmental Policy Act should be substituted for the phraseology of S. 653 of the City of Winnipeg Act. The section should read: The Executive Policy Committee shall provide council with a detailed statement before such work is recommended to council

on:

- a) the environmental impact of the proposed work;
- b) any adverse environmental effects which cannot be avoided should the work be undertaken; and
- c) alternatives to the proposed action.

Project must be both a work and public

S. 653 requires that the Executive Policy Committee report to council on the environmental effects of projects which are both public, i.e. undertaken by the City, and a work, as defined by the Act.

The City of Winnipeg Act includes "works" in the

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definition section S. (1) TT. "Works" includes buildings, walls, bridges, trestlework, dams, canals, locks, tunnels, subways, wharfs, piers, fences, viaducts, aqueducts, embankments of streams, ditches, culverts, drains, sewers, vaults, mines, wells, roads, pavements, sidewalks, pathways, pedestrian decks or tunnels, street railways, the towers, poles, lines and equipment of transportation or transit systems, harbours, docks, booms, excavations, and fabrics made, built, constructed, erected, extended, enlarged, repaired, improved, formed, or excavated by means of, or with the aid of human skill and human, animal or mechanical labour. This is an open-ended definition and undertakings not specifically mentioned may be "works" within the meaning of S. 653 (1).

In the case of *Stein v the City of Winnipeg*<sup>1</sup> referred to earlier, the Manitoba Court of Appeal had little trouble in determining that the spraying of City owned trees with the insecticide methoxychlor was a "public work" within the meaning of S. 653 (1). The fact that fogging or spraying were not specifically included in the definition section posed no problem for the court. The term "work" is not, however, wide enough to include any and all undertakings

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1. supra

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which the City may initiate and which may have profound environmental effects. The City has powers to expropriate, lease, buy, trade, sell and re-zone land. It has regulatory and licensing powers over the operations of business. It has control over transit - both public and private and can influence growth patterns through land banking, development agreements, and the adoption of district plans.

In fact, most decisions implemented by the City which have a significant effect on the quality of the human environment are not works within the meaning of S. 653 and are, therefore, not subject to the requirements of the review process.

Three illustrations exemplify this point.

a) Trizec Co. Ltd., and the City of Winnipeg entered into an agreement to develop jointly the corner of Portage and Main. The City was to expropriate land at that intersection, build a 1000 car underground parking garage, and lease to Trizec the air rights for a 99 year period. Trizec, not the City, was to build and operate a hotel, department store, and office building on the site. The expropriation and lease were not subjected to any environmental impact report even though the ramifications of these actions were obviously profound. Only the garage to be constructed by the City came within the meaning of

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"work" as contemplated by S. 653.

b) To enable Markborough Properties/Bestlands Ltd., to develop "Centennial Gardens" at the intersection of Ellice and Balmoral, the City sold to the developer at a nominal price the Waterworks Building at that corner. It also offered to lease the internal portion of the development from the company and to maintain it free as "public park" for 99 years. Subsequently in order to facilitate the construction of Centennial Square, the City voted to exempt Markborough/Bestlands from the 10% land or money dedication requirement imposed by the City of Winnipeg Act.

These actions of the City were in direct contemplation of the construction of a mammoth development which would have profound environmental effects on the surrounding neighbourhood but the term "works" is not wide enough to bring these actions within the grasp of S. 653.\*

c) The proposal by Canadian National Railways and the Great West Life to develop the East Yards required that the land be rezoned by the City. The development itself which may affect the entire growth pattern of Winnipeg and especially the core area is not subject to the requirements of S. 653 because it is a private not a public work and the rezoning is not subject to S. 653 because it is not a work.

A council which is unwilling to subject its proposals to the review process can circumvent its

\* See Epstein "Centennial Gardens"



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operation merely by encouraging, subsidizing and regulating development rather than directly undertaking it.

#### Recommendation

The word "work" should be replaced with the phrase "work or action".

#### Public v Private

It is only the undertaking of public works as opposed to private works which trigger the environmental review process. Private developers or the senior governments may initiate projects in the City which profoundly affect its character; yet City council may be powerless to exert any control over the undertaking. As it is not a public work no Environmental Impact Statement need be prepared. Thus the City may never even be aware of possible adverse impacts of the project until after they begin.

If the City was given the power to require private developers, including senior governments, to prepare Impact Statements it would be in a better position to control the effects of the property in question. Time must be made available to enable the City to consider purchase, zoning or expropriation proceedings, or to take any steps necessary to alleviate the adverse effects of the project.

#### Recommendation

The City should be given power to require any private person desiring to undertake a work which may significantly affect the environment to prepare and file a detailed Environmental Impact Statement with City officials. The document should be prepared and paid for by the proponent of the work but must meet the requirements of the guidelines and be subjected to public scrutiny in the same manner as Environmental Impact Statements prepared by public officials.

#### Effect of Recent Amendments

History: On March 7, 1974 the Clean Environment Commission<sup>1</sup> considered an application from the City of Winnipeg for the prescribing of limits in con-

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nection with an operation involving the spraying of deciduous trees and shrubs either with the chemical methoxychlor or the biological insecticide Dipel in order to control tree leaf eating insects on properties owned by the City. After holding public hearings and considering the application the Commission issued an order<sup>2</sup> allowing the commencement of the operation within certain limits. Mrs. Irene Stein, who had objected to the spraying program, launched court action to have it halted. Mrs. Stein's main contention was that the City was acting without lawful authority in setting the program into operation because S. 653 of the City of Winnipeg Act had been ignored. The Executive Policy Committee had not reported to council on the environmental impact of the program. Despite the failure of the Manitoba Court of Appeal to grant the preliminary injunction, the judges were unanimous in expressing the opinion that S. 653 was applicable to the program in question and that the City, by acting without the report required by that section may be proceeding in violation of statutory requirements.

1. Quasi judicial body established under the Clean Environment Act.
2. No. 346 dated April 28, 1974.

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The Executive Policy Committee, after receiving advice from City solicitors as to the ramifications of proceeding as they were, approached the Provincial Government to amend the Act so as to excuse the City from the operation of S. 653 in the carrying out of the tree spraying program. On the last day of the 1974 Spring Session of the legislature an amendment to the City of Winnipeg Act was passed.

The result is S. 653 (3) and (4) which read as follows:

S. 653 (3) In this section "public work" does not include the maintenance of streets, parks, boulevards, water systems, sewer systems, electrical utilities or buildings or appurtenances thereto owned or occupied by the city.

S. 653 (4) Where, after January 1, 1972, a public work has been undertaken following the approval of a proposal therefor by the Clean Environment Commission under the Clean Environment Act, subsection (1) is deemed to be satisfied for all purposes.

This "retroactive legislation" effectively put Mrs. Stein out of court.

#### Ramifications of Amendments

The effect of S. 653 (3), excluding maintenance projects from the operation of S. 653, was considered by

Mr. Justice Solomon in the case of Miller v City of Winnipeg<sup>1</sup>. One question that the court had to consider was whether or not the construction and realignment<sup>2</sup> of Wellington Crescent between Wardlaw and Academy was maintenance of a street as contemplated by S. 653 (3). Mr. Justice Solomon stated: "Realignment and reconstruction of pavement on Wellington Crescent is not new construction. It is repair of the existing street to meet the modern traffic requirements. The City is duty bound to adequately maintain the street for the purposes needed in 1975. What was adequate at the turn of the century is not adequate today. Evidence indicates the street was in a very bad state of repair and seriously substandard for modern traffic requirements. The City decided to realign and rebuild the street to meet modern requirements. It was not constructing new public work; it was modernizing the street that became obsolete and unsafe for the use of the public of today."

#### Recommendation

For the purpose of S. 653, maintenance should be explicitly defined to ensure that the intention of the legislature is not thwarted by overly liberal or restrictive judicial interpretations. Maintenance is

1. Unreported.

2. The project included demolition of 4 houses, the creation of an additional traffic lane, and the straightening of the turn on to Stradbrook, all of which would result in a larger volume of traffic travelling through the area, according to the applicant, Mr. Miller.

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defined as "act of maintaining or being maintained, preservation and upkeep of buildings, roads and machines."<sup>1</sup> It is suggested that to this definition the phrase "does not include improvements" be added.

S. 653 (4) exempting works from the operation of S. 653 if approval has been obtained from the Clean Environment Commission, is a reasonable amendment to the Act. The function of the Clean Environment Commission is to consider environmental impacts of a proposal and determine whether or not the benefits of the proposal in question outweigh its harmful effects. Thus, on the face of it, the preparation of an Environmental Impact Statement seems to be redundant. However, it must be pointed out that the Clean Environment Commission often carries out its functions without having access to all relevant material and data. The Commission has no staff of its own to investigate the effects of undertakings which are under the consideration of the Commission. Reliance is placed on the Department of Mines, Natural Resources and Environment which is understaffed and overworked and, therefore, does not, in some cases, provide necessary information to the Commission.

#### Recommendation

S. 653 should be amended to require the City

1. Webster's New Encyclopaedic Dictionary

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to file with the Commission a detailed statement of the proposed work outlining the benefits of the program under consideration and the risks involved in its undertaking.

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Requirements and Ramifications of Report 1338/74 entitled:  
Guidelines for the Preparation of Environmental Impact  
Reports under S. 653 of the City of Winnipeg Act

History: On February 14, 1974 the Executive Policy Committee passed a motion which reads as follows:

"That the Board of Commissioners be instructed to prepare guidelines for the timing, content, methodology and resources relative to the preparation of future Environmental Impact

Reviews under S. 653 of the City of Winnipeg Act."

Pursuant to this motion, a report outlining guidelines was adopted by City council on October 16, 1974 on recommendations from the Environment Committee.

Contents: The guidelines include a discussion of:

1. The timing of stages in a recommended Review Process;
2. Allocation of resources necessary to prepare consistently adequate Reviews; and
3. Recommended guidelines for the methodology and content of all Environmental Impact Reviews.

1. Timing

The Guidelines contemplate six distinct stages in the Review Process, which are as follows:

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- a) Identification of public work projects which may significantly affect the quality of the human environment.

Since it is the Executive Policy Committee which must report to council on the effect of said public works, it is also the Executive Policy Committee which must determine whether or not a particular public work "may significantly affect the quality of the human environment" and thereby trigger the requirements of S. 653.

The guidelines recommended that a Review Board be established to advise and assist the Executive Policy Committee in their determination of significance. The review committee consisting of:

- i) a member of the law department
- ii) Director of Operations, Works & Operations
- iii) Chief Planner, Environmental Planning Division
- iv) Assistant Director of Public Welfare, Welfare Department

would review all proposals of the various civic departments before the proposals are referred to the Standing Committee as part of the annual current or capital budget. The Review Committee when presenting the proposals to the Executive Policy Committee would include a recommendation



as to their significance. Reasons would be included.

Criteria to be used in determination of  
significance:

- i) if it is likely to produce any major deleterious change in the existing human environment;
  - ii) if it is likely to produce both major positive and major negative changes in the existing environment but the balance of such changes appears to be positive, or is not readily evident;
  - iii) if it is likely to be controversial;
  - iv) if the overall or accumulative effects of the proposal or proposals, in conjunction with existing works, or with each other, is likely to produce any major deleterious change in the existing human environment.
- b) Decision of the Executive Policy Committee on which proposals are significant. To facilitate this decision, the Executive Policy Committee convenes a public meeting and receives delegations from any member of the public. The Executive Policy Committee directs that an Environmental Impact Review be prepared on those proposals it deems significant.

- c) The Environmental Impact Review is prepared by City administration.
- d) The Environmental Impact Review is submitted to the Review Committee in order that its adequacy be determined.
- e) The Executive Policy Committee makes the final determination of adequacy of any Environmental Impact Review. Again, a public meeting is convened to receive representation from any member of the public. The guidelines, in fact, recommend that a draft Environmental Impact Review be published and circulated for public reaction.
- f) The Executive Policy Committee reports to council on the environmental impact of the project and council approves or disapproves of the proposal.

## 2. Allocation of Resources

Pursuant to the Guidelines, a task force to prepare a particular Environmental Impact Review is established from within the administration. The task force will, by necessity, vary from case to case depending on the available expertise. In fact, the Guidelines recognize

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that in certain circumstances it may be required to engage consultants from outside the administration.

In order to consolidate experiences and retain consistency, the Guidelines recommend that a "permanent committee be established around which each Task Force can be built."<sup>1</sup>

The core committee will have the responsibility to:

- 1) assemble/<sup>an</sup>appropriate Task Force in response to a directive to prepare a review;
- 2) coordinate inputs from Task Force members and initiate further necessary research;
- 3) compile/<sup>the</sup>actual review;
- 4) maintain and update a library of materials relevant to the North American, and particularly the Winnipeg, experience with Environmental Impact Reviews.<sup>2</sup>

### 3. Methodology and Content

The Guidelines drafted to ensure the preparation of an adequate review appear to be derived directly from the American experience under the National Environmental

1. Guidelines, p. 12

2. Guidelines, p. 12 & 13

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Policy Act, The Guidelines recommend that the reviews be overly rather than insufficiently comprehensive in order to meet legal requirements.<sup>1</sup>

The following criteria are recommended on which to test adequacy of impact reviews:

- a) it shall be prepared in such a way that it may be fully understood by the layman;
- b) it shall explicitly state any major qualitative or quantitative assumptions central to the justification and assessment of the proposed public work;
- c) it shall substantiate conclusory statements by reference to any underlying reports, studies or other information used in the preparation;
- d) it shall contain a complete description of the proposed action, including its purposes, location, extent, scope, staging and the methods and materials to be used in its construction or alteration;
- e) it shall contain a comprehensive description of the project environment as it currently exists, including physical, social and demographic, economic and cultural components;

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1. Guidelines p. 15

- f) it shall make explicit the relationship of the proposed public work to existing public policies and programs affecting the project environment;
- g) it shall include an evaluation of alternatives to the proposed action, including both conceptual and design alternatives;
- h) it shall include a discussion of the potential effects of the proposed public work on the quality of the human environment including beneficial and deleterious, direct and indirect, individual and cumulative, qualitative and quantitative, temporary and permanent, avoidable and unavoidable effects;
- i) it shall make explicit any irreversible or irretrievable commitment of resources or irrevocable public policy commitment, entailed in the implementation of the proposed public work;
- j) the final impact review shall contain some concrete indication that substantive submissions in response to the draft form have been considered.

Efficacy of Guidelines

The review process contemplated by the Guidelines has been in operation for such a short period of time that an empirical study of its worth would be of little value. The Review Board, in considering projects to be included in the 1975 budget, recommended that five public works projects be subjected to an Environmental Impact Review. The Executive Policy Committee decided that only one of the five required a review. The public meeting held by the Executive Policy Committee did nothing to change that decision.

Only one review has been compiled since adoption of the Guidelines - that being the parking garage at Portage and Main. This review, based on the assumption that the project would proceed, was little more than a charade. Criticism of the draft review from a variety of delegations resulted in an addendum to the draft being compiled but the document in question was still little more than a justification of the project.

An analysis of the Guidelines, coupled with the knowledge gained from their short history, does reveal, however, that a number of fundamental changes must be enacted in order to render the process a meaningful one.

Recommendations

a) The Review Committee is vital to the proper functioning of the process and should, therefore, be given statutory status. It should consist of members drawn from not only the administration but from a broad spectrum of the public.

b) The Review Committee must be given wide statutory powers to hold public hearings or meetings, conduct perception and attitude surveys or devise any other practical methods to determine public response.

c) Citizens wishing to appear at the hearings or before the Executive Policy Committee must be guaranteed access to all relevant information.

d) A funding mechanism must be established to enable interested parties to prepare their submissions thoroughly and properly.

e) A mechanism should be set up to monitor the real effects of projects in order to test the validity of assumptions and the predictions set out in the Environmental Impact Statement.<sup>1</sup>

f) A cost-benefit analysis should be included as part of the environmental review. The introduction to

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1. These recommendations were drawn from a brief presented to the Environment Committee by Winnipeg Pollution Probe. City council, at the meeting of October 16, 1974, rejected an amendment which would have included these recommendations by a vote of 24 to 6. Appendix C.

page twenty-eight (a)

the Guidelines states:

"The scope of an Environmental Impact Review must include in addition to obvious physical impact, impact on the cultural, social or economic components of the environment."<sup>1</sup>

No review yet prepared by the City has referred to the economics of the work and, in fact, the review of the parking garage at Portage and Main rejected economics as a component of an impact review. This review states on p. 7

"Factors related to the economics of the proposed parking structure and the associated development are beyond the scope of this review."

It is suggested that recommendations and decisions must be based on, inter alia, a balance of economics and environmental factors.

#### Legal Effects of Guidelines

As a general principle, policies, guidelines and reports adopted by a Municipal Council are not binding on that council. It may be argued that this general principle is overridden by S. 654 of the City of Winnipeg Act, which reads:

1. Guidelines p. 4



All plans, by-laws, orders or decisions established, enacted, or made under this part are binding on the City and all persons including Her Majesty.

There has, however, been no judicial interpretation of this section. The American experience reveals a willingness on the part of the courts to take into account in determining whether or not an agency has complied with the National Environmental Policy Act the guidelines adopted by that agency,<sup>1</sup> but to avoid all confusion and doubt it is recommended that the guidelines be given statutory authority.

#### Role of the Courts in Determining Compliance with S. 653

It is clear that the courts have the jurisdiction to interfere with decisions of a municipal Council if statutory procedures are not complied with. Thus if the Executive Policy Committee never turns its collective mind to the question of environmental impact, the court may halt the implementation of the public work in question. More difficult questions arise, however, if the Executive Policy Committee does purport to carry out its mandate, as set

1. Scherr v Volpe 336 F. Supp. 882  
Silva v Romney 342 F. Supp. 783

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out in S. 653. Three issues must be dealt with in determining the role to be played by the courts in the operation of the review process.

1. Can the courts review a decision of the Executive Policy Committee as to whether or not a project "significantly affects the quality of the human environment" and is, therefore, subject to S. 653?

2. Can the courts review a decision by the Executive Policy Committee as to the adequacy of the impact statement?

3. Can the courts interfere with a decision of council as to whether or not the public work in question should be implemented?

1. There are two views as to the role of the courts in determining significance. One is that if the decision of significance is arrived at by the Executive Policy Committee acting in good faith and in adherence to the basic rules of fair procedure, the courts will not interfere no matter how unreasonable the decision. The Executive Policy Committee, it is argued, is given a statutory discretion to determine significance and the committee need only exercise its discretion to discharge

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its duty.<sup>1</sup>

The more liberal view is that the language is objective not subjective, and, therefore, the court may apply objective standards to test the adequacy of the committee's decision. If the legislation intended to give the Executive Policy Committee broad discretion in the matter, it is argued that the wording of the statute would have clearly done so. It could have read, for example,

"The Executive Policy Committee shall report to council on any project which, in the opinion of the Executive Policy Committee, may significantly affect the quality of the human environment."

Support for both lines of reasoning may be found by reference to decisions of American courts<sup>2</sup>. It must be pointed out, however, that Rules governing judicial review in the United States are different from the Canadian rules.

The question is judicially untested in Canada but may be put before the courts in the case of *Easton v City of Winnipeg*,<sup>3</sup> which involves the building of a bridge connecting St. Vital and St. Boniface which may have the effect of placing additional traffic pressure on a quiet

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1. General Reflections on the Legal Requirements of S. 653 of the City of Winnipeg Act. Brian M. Corrin, Solicitor Law Department, City of Winnipeg.

2. Anderson, Frederick, N.E.P.A. in the Courts, p. 96-101.

3. Yet to be tried.

residential area. The Executive Policy Committee in an indirect way determined that the project was not significant. Thus the question of whether or not the statute is subjective or objective may be determined by the courts in the near future.

In any event, it is suggested that the courts should have full power of review. It is submitted that the argument put forth by Anderson<sup>1</sup> for full judicial review is apropos the Winnipeg situation.

Mr. Anderson argues as follows:

"N.E.P.A. is unlike the majority of usual regulatory statutes. It neither sets up an agency to supervise private conduct nor supplements existing regulatory authority. Nor does the act pinpoint a particular ill for which a precisely focused statute may legislate a cure. Instead, the act attempts to regulate the way in which all federal agencies make decisions. They are told to consider matters alien to their own limited self-interest, to expend time and money on statement preparation, to delay favourite projects, and to do all this when the benefits of the process do not redound to the agency involved but to the good of the environment. Such considerations suggest the inherent weakness of agency self-policing under the National Environmental Policy Act, particularly since

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1. - Op.Cit.

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S. 102 duties are not inherently flexible but demand a strict standard of compliance. Without a judicial check the temptation would be to shortcircuit the process by setting statement thresholds as high as possible within the vague bounds of the arbitrary or capricious standard. The past history of agency "crabbed interpretations" making a "mockery of the Act" leaves little room for confidence."

#### Recommendation

The statute should be amended to ensure that the decisions of the Executive Policy Committee on "significance" are subject to the judicial review.

2. What role the courts will assume in reviewing the adequacy of an Environmental Impact Review once prepared has not yet been determined. They will certainly scrutinize the report to determine whether or not it deals with the matters set out in s.s. (a), (b) and (c) of S. 653, but whether or not the court will probe the report to determine compliance with the Guidelines is another matter.

American litigation sheds some light on the

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issue but, as pointed out by Mr. Corrin<sup>1</sup>, their experience is not quite germane because the wording of the National Environmental Policy Act is different from the City of Winnipeg Act.

The opening words of S. 102 of the National Environmental Policy Act read:

"The congress authorizes and directs that, to the fullest extent possible the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this act. (underlining mine)

A full discussion of American jurisprudence is found in Corrin's paper and Anderson's book, and is beyond the scope of this policy paper.

It is suggested that the courts should be given full power to review the adequacy of the Statement. The reason is identical to the reason for giving the courts power to review an Executive Policy Committee decision on significance. To give the Executive Policy Committee power to police itself would amount to a sterilization of the act.

The courts should be utilized because it is an existing institution experienced in dealing with questions such as these and able to control frivolous actions by way of preliminary motions and costs.

#### Recommendations

The court should be given jurisdiction to review the impact statement to determine adequacy.

3. S. 653 is a procedural directive not a substantive one. There is no onus on the Executive Policy Committee or council to pursue the course of action recommended in the

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1. Supra

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environmental report. To the contrary, a work may be undertaken despite its environmentally degrading consequences. The American courts have on occasion interpreted the National Environmental Policy Act substantively<sup>1</sup> but as pointed out earlier, that statute is more comprehensive and all-encompassing than ours. It is submitted that the wording of S. 653 does not lend itself to the liberal substantive interpretation as does the National Environmental Policy Act.

#### Recommendations

The court should not be given power to review political decisions on the merits. The review process will have fulfilled its function if the decision makers have access to and consider all the facts before embarking on a course of action which may be environmentally harmful or financially disastrous. The impact review, being a public document, will open the decision making process and thus render it more responsive.

#### Standing To Initiate Court Proceedings

The general principle of law is that only the Attorney-General can commence court proceedings to enforce the provisions of a statute. A private person may initiate

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<sup>1</sup> N.E.P.A. in the Courts p. 247 - 327

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proceedings if, and only if, he has suffered or will suffer damage different in kind from the rest of the public. Moreover, an owner of property which would be affected by the undertaking in question could maintain an action without the cooperation of the Attorney-General. However, an ordinary member of the public with no property interest was not given access to the courts without the Attorney-General.

An exception to this principle was the notion that a taxpayer could commence an action against a municipality to prevent unauthorized or illegal expenditure of money. This exception has been greatly extended by the cases of *Thorson v Attorney-General*<sup>1</sup> and *Stein v City of Winnipeg*<sup>2</sup>. The latter case dealt with a private citizen commencing proceedings against the City for non compliance with S. 653. The question of status was considered by the Manitoba Court of Appeal and it was unanimously decided that the plaintiff Mrs. Stein was entitled to maintain court action without cooperation from the Attorney-General even though she suffered damages no different in kind from the rest of the public.

Whether this finding would extend to non compliance by a private person rather than a government agency has not yet been determined.

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1. 1974 43 DLR 1  
2. 1974 5 WWR 484



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### Recommendations

The section should be amended to give any resident of Winnipeg status to maintain legal proceedings against the City or any other corporation, person or entity who has not fulfilled the requirements of S. 653 or to ask the court to review any decision made by the Executive Policy Committee in the carrying out of its statutory obligations.

### CONCLUSIONS

An effective review process will not only open the decision making process to public scrutiny but will ensure that all factors are considered in deciding whether or not an action should be undertaken. The value of this type of disclosure is exemplified by the current controversy over the Garrison Diversion Project. Were it not for the fact that an environmental impact review was prepared by the United States Corps of Engineers, the effects of this irrigation project on Canada would still be unknown. Only because the Corps of Engineers is subject to the National Environmental Policy Act have the Canadian and Provincial governments and citizens become knowledgeable about the project. Only because of the Review Process existing in the United States will we be able to take steps to protect our waters.

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The costs of implementing the process as outlined may appear high but in the long run thousands of dollars will be saved. To some, it may seem an unnecessary expense to establish a Review Committee and occasionally employ outside consultants, but the information derived from the exercise will enable the decision makers to change, modify or alter the plans of the particular action in question in order to save public funds. The administration had spent tens of thousands of dollars in planning a freeway over the Canadian Pacific Railway yards.<sup>1</sup> The project was subsequently halted because it was realized that it was unnecessary<sup>2</sup> and too costly. An Environmental Impact Review prepared early in the decision making process would have revealed these facts and saved thousands of public dollars.

The Environmental Impact Report prepared on the Portage and Main underground parking garage, even though prepared after the fact, provides information to the planners which is essential in designing the garage.<sup>3</sup> The Statement reveals that to accommodate the traffic generated by the garage a second ingress and egress on Garry Street is necessary. This mandates not only the acquisition of

1. Sherbrook McGregor Overpass (Scheme D)
2. Rail Relocation would have rendered a bridge superflous.
3. Appendix D.

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additional land on Garry Street but also a peculiar design for the garage. The design information is obviously essential information for the engineers while council is surely entitled to know that in voting to build a garage on Fort Street it is necessary to acquire land on Garry St.

Common sense tells us that before a decision should be made, all its consequences should be disclosed and considered. S. 653 of the City of Winnipeg Act does nothing more than put common sense to writing.