ANNUAL SURVEY OF CANADIAN LAW

ENVIRONMENTAL LAW 1975-1980

*John Swaigen**

I. THREE PHASES OF ENVIRONMENTAL LAW: FROM TORTS TO AD HOCKERY

In the *Ottawa Law Review's* first survey of environmental law in Canada published in the spring of 1975,[1] David Estrin reviewed the evidence of the existence of this new speciality and predicted its continued growth. He briefly described the situation until the early 1950's — a sparse collection of legislation supplemented by tort remedies — and identified three phases of legislation and institutional arrangements that had evolved over the next two decades.

During phase I, Estrin explained, the "brief and heavy-handed" strictures of nineteenth century legislation and torts were supplemented by statutes designed to clean up pollution of specific media — land, air and water — and impose licensing systems to prevent future pollution.

Phase II was described as an attempt to "demonstrate a more comprehensive approach to what was being increasingly recognized as a holistic problem of critical importance to man's survival".[2] This was to be accomplished by taking staff from various government agencies and integrating them at both federal and provincial levels into a new Department or Ministry of the Environment. Existing legislation was consolidated into more extensive statutes designed to bring a degree of uniformity to the treatment of pollution, regardless of the medium in which the pollution was found. Estrin was critical of politicians' claims that such legislation was comprehensive, for although the legislation purported to prohibit pollution, it usually granted the government unfettered discretion to override the prohibition through exemptions, exceptions, licences, and orders.

Phase III would consist of the passage of laws that would require an

---

* Of the Ontario Bar, Toronto.

[1] Estrin, *Annual Survey of Canadian Law — Part 2: Environment*, 7 OTTAWA L. REV. 397 (1975).

[2] *Id.* at 405.

environmental impact assessment of public and private projects which might have a significant negative impact on the environment. Before their approval, the legislation would provide an opportunity for a wide variety of community interests to make a contribution to the assessment process. Public interest groups, as well as persons whose property or financial interests would be affected by approval of the damaging project or program, would have timely notice of the plans, access to adequate information, standing to appear before a demonstrably independent tribunal, funding provided by the proponent or a government agency, and an opportunity for judicial review of unfair procedures and jurisdictional defects. It was predicted that more and more lawyers would find themselves involved in the resolution of environmental disputes and that the role of the judiciary would continue to expand.

Phase III was just beginning as Estrin finished his survey in the fall of 1974. He described the *ad hoc* commissions of inquiry being appointed at the time by the federal government and various provincial governments to obtain scientific evidence and facilitate public involvement in politically-sensitive decisions. He saw inquiries such as the one into the routing of a transmission line that Ontario Hydro wanted to build across agricultural lands and the picturesque Niagara Escarpment[3] and the Berger Inquiry[4] into the impact of the proposed Mackenzie Valley natural gas pipeline as precursors of an institutionalization of phase III mechanisms. These inquiries were, he thought, a transitional phase that would soon be replaced by routine environmental impact assessments of all major projects and programs. Indeed, much of what Estrin suggested has come to pass in the second half of the 1970's, except that *ad hoc* inquiry commissions have proliferated instead of disappearing.

Apart from the occasional voice crying "humbug" in the wilderness,[5] between 1975 and 1980 environmental law continued to consolidate its position in the panoply of legal specialities. New legal texts and materials have been produced.[6] No longer a novelty, "environmental

---

[3] *Id.* at 399. n. 8, 415.

[4] *Id.*

[5] *E.g.*, Mr. Justice Willard Estey, at the time Chief Justice of the High Court, Supreme Court of Ontario, was quoted in a newspaper interview as saying:

> There's about twelve subjects that everybody has to have, and then you need a few other options. But to teach Environmental Law, in my opinion, is a terrible waste of the taxpayers' money, and it's a waste of the guy's life. Environmental Law is about as new as the law of torts. You can learn it all in torts. Now what do you need a course in that for?

Mr. Justice Estey's comment was made in the context of his views on certain aspects of legal education. *See* OBITER DICTA, November 8, 1976, at 1 (a publication of the Osgoode Hall Law School).

[6] R. FRANSON & A. LUCAS, CANADIAN ENVIRONMENTAL LAW (1978); D. EMOND, ENVIRONMENTAL ASSESSMENT LAW IN CANADA (1978); D. ESTRIN & J. SWAIGEN, ENVIRONMENT ON TRIAL (rev. ed. M.A. Carswell & J. Swaigen eds. 1978); J. INCE, ENVIRONMENTAL LAW: A STUDY OF LEGISLATION AFFECTING THE ENVIRONMENT OF BRITISH COLUMBIA (1976) (updated annually); J. INCE, LAND USE LAW: A STUDY OF LEGISLATION GOVERNING LAND USE IN BRITISH COLUMBIA (1977) (updated annually).

law'' *per se* became the subject-matter of fewer conferences, although many conferences were held to discuss specific aspects of environmental law such as environmental impact assessment, the regulatory climate, control of acid precipitation, and the transportation of hazardous substances.[7]

The Berger Inquiry, which was established in 1974, reported approximately three years later recommending a moratorium on the construction of a northern pipeline and prior settlement of native land claims.[8] Berger's report became an instant best seller. His inquiry set the tone and became the model for subsequent environmental commissions. The public perceived Berger as open to native and environmental concerns and his procedures were considered — at least by environmentalists — to be the epitome of fairness. By its informality — travelling to remote native communities; holding hearings in the language of the native participants; providing funding to intervenors; demanding access to government information; accepting as relevant a wide variety of evidence; inviting public submissions on procedures; requiring timely disclosure of the material on which all parties intended to rely; and arranging daily radio broadcasts from the hearings in native languages — the Berger Inquiry made its mark.

It had a profound influence on public expectations for future *ad hoc* commissions and public hearings before ongoing, established tribunals.[9] Commissioners subsequently appointed to consider environmental issues made pilgrimages to Mr. Justice Berger or his staff before beginning their work. Several have emulated his process, if not his sensitivity and insight. A number of environmental commissions of inquiry which were established in the second half of the decade are briefly discussed below.

The Royal Commission on Electric Power Planning in Ontario, chaired by Dr. Arthur Porter, published its final conclusions in the first of a nine-volume series of reports in April of 1980[10] after spending five years and five million dollars[11] on studies and public hearings. The Commission had discussed nuclear energy earlier in an interim report and found it acceptably safe, despite growing public opposition to nuclear reactors and refineries.[12]

---

[7] Published proceedings of such conferences include ENVIRONMENTAL IMPACT ASSESSMENT IN CANADA: PROCESSES AND APPROACHES (M. Plewes & J. Whitney eds. 1977); ENVIRONMENT COUNCIL OF ALBERTA, INVOLVEMENT AND ENVIRONMENT (B. Sadler ed. 2 vols. 1978); *Canadian Wildlife Resources. The Role of and Management of Wildlife as a Natural Resource* (G.B. Priddle ed.) in CONTACT, Spring 1980, at 1.

[8] NORTHERN FRONTIER, NORTHERN HOMELAND: REPORT OF THE MACKENZIE VALLEY PIPELINE INQUIRY (Berger J. Chairman 2 vols. 1977).

[9] For further information about the Berger Inquiry, *see* Gamble, *The Berger Inquiry: An Impact Assessment Process*, 199 SCIENCE 946 (1978); M. O'MALLEY, THE PAST AND FUTURE LAND: AN ACCOUNT OF THE BERGER INQUIRY INTO THE MACKENZIE VALLEY PIPELINE (1976); Berger, *The Mackenzie Valley Pipeline Inquiry*, 16 OSGOODE HALL L.J. 639 (1978).

[10] REPORT OF THE ROYAL COMMISSION ON ELECTRIC POWER PLANNING, VOLUME 1: CONCEPTS, CONCLUSIONS AND RECOMMENDATIONS (A. Porter Chairman 1980).

[11] The Globe and Mail (Toronto), Apr. 4, 1980, at 6, col. 1.

[12] ROYAL COMMISSION ON ELECTRIC POWER PLANNING, A RACE AGAINST TIME:

The Ontario Royal Commission on the Northern Environment was established in December, 1976 to review a proposal by a paper company to log almost 19,000 square miles of northwestern Ontario forests.[13] Before the Order-in-Council was passed, its terms of reference had been expanded to consideration of all resource development in Ontario north of the 50th parallel — a region comprising more than half the province's land mass. The Commissioner, Mr. Justice Patrick Hartt, issued a report outlining the issues as expressed to him during public hearings.[14] Hartt also produced an interim report containing recommendations for environmental impact assessment of specific projects; the appointment of a task force of northern residents to find ways for these people to have effective involvement in government decision-making; a moratorium on granting wild rice harvesting licences to non-Indians; and a committee composed of senior federal and provincial representatives and representatives of the Indian people to negotiate resolution of resource, pollution, and self-government disputes.[15] Hartt resigned in August of 1978. He was replaced by Edwin Fahlgren, a mining company executive from Red Lake in northwestern Ontario.

Ontario even appointed a Royal Commission to investigate whether a $35,000 donation to the Progressive Conservative Party of Ontario, by a waste disposal company applying for licences to operate three sanitary landfill sites, was intended as a bribe.[16] An internal memorandum of the company that gave the donation stated that it was given for "political purposes". Residents of two municipalities who had been affected by pollution from waste disposal sites operated by subsidiaries of this company, and who wondered whether the Ontario government's refusal to prosecute breaches of the Environmental Protection Act, 1971[17] resulted from this gift, were refused standing to have legal representation at this inquiry. The Commissioner, Mr. Justice Samuel Hughes, ruled that the residents were interested in pollution rather than in corruption, which was the subject-matter of his inquiry; but he was overruled by Ontario's Divisional Court which granted the residents standing.[18] The Commissioner did not find any evidence of corruption, but he did recommend that Ontario enforce its environmental laws more uniformly.

INTERIM REPORT ON NUCLEAR POWER IN ONTARIO (A. Porter Chairman 1978).

[13] The Commission was established by P.C. 1900-77 (1977).

[14] ROYAL COMMISSION ON THE NORTHERN ENVIRONMENT, ISSUES REPORT (Hartt J. Chairman 1978).

[15] ROYAL COMMISSION ON THE NORTHERN ENVIRONMENT, INTERIM REPORT AND RECOMMENDATIONS (Hartt J. Chairman 1978).

[16] The Commission was established by Order-in-Council under the Public Inquiries Act, 1971, S.O. 1971, c. 49, on May 15, 1977. *See* REPORT OF THE ROYAL COMMISSION APPOINTED TO INQUIRE INTO WASTE MANAGEMENT INC., ET CETERA (Hughes J. Commissioner 1978). The Report's recommendations are reprinted in 7 Canadian Environmental Law Reports 126 [hereinafter cited as C.E.L.R.].

[17] S.O. 1971, c. 86 [hereinafter cited as the Environmental Protection Act].

[18] *Re* Royal Comm'n on Conduct of Waste Mgt. Inc., 17 O.R. (2d) 207, 6 CANADIAN ENVIRONMENTAL LAW NEWS 114 (Div'l Ct. 1977) [hereinafter cited as C.E.L.N.].

At least two *ad hoc* inquiries took place in British Columbia during the same period, one federally established and one set up by the provincial government. Early in 1978, Dr. Andrew R. Thompson, Commissioner of the West Coast Oil Ports Inquiry, completed a review of potential damage to the environment and the fishing industry from oil tanker traffic to a proposed terminal at Kitimat, B.C.[19] Following submission of Dr. Thompson's interim recommendations to the federal government, Environment Minister Len Marchand terminated the Inquiry, stating that "the Federal Government sees no need for a west coast oil port now or in the foreseeable future, and doubts that the benefits of establishing such a port would be sufficient to offset the danger of risking a major spill".[20]

The Royal Commission of Inquiry into Uranium Mining in British Columbia was established in 1979 to look into the health and environmental effects of expansion of uranium exploration and mining.[21] It was in the midst of public hearings in February, 1980 when the Premier announced a seven-year moratorium on further development of the province's relatively meagre uranium resources. He terminated the Inquiry and gave the Commissioners three months to report their findings based on the evidence they had heard, but as a result of public demand the government announced a few days later that the Inquiry would be allowed to continue long enough to hear further environmental evidence and complete studies that had already been commissioned.

In Saskatchewan, the Cluff Lake Board of Inquiry concluded that uranium could be mined and milled at Cluff Lake without serious adverse effects on the environment if changes were made to the law and there was strict compliance with legal standards and performance levels. The three-person Board also considered the moral and ethical implications of a project which would contribute to the development and use of nuclear energy, and concluded that "[t]he consequences of the expansion of the uranium mining/milling industry in Saskatchewan are ethically acceptable".[22]

The federal government also appointed a three-man board, under the chairmanship of Kenneth Lysyk of the University of British Columbia, Faculty of Law, to investigate the environmental impact of the proposed Alaska Highway Pipeline.[23]

---

[19] *See* WEST COAST OIL PORTS INQUIRY: STATEMENT OF PROCEEDINGS (A. Thompson Commissioner 1978). The final report was issued in March, 1978. The government terminated the Inquiry before it had an opportunity to deal fully with certain other issues.

[20] Len Marchand, Environment Canada Press Release (Feb. 23, 1978). *See also* STATEMENT BY THE HONOURABLE IONA CAMPAGNOLA — WEST COAST OIL PORTS (Feb. 23, 1978).

[21] ROYAL COMMISSION OF INQUIRY, FIRST INTERIM REPORT ON URANIUM EXPLORATION (Dr. D. Bates Chairman 1979).

[22] THE CLUFF LAKE BOARD OF INQUIRY FINAL REPORT 288 (Bayda J. Chairman 1978). The Commission was established by P.C. 222-27 (1977).

[23] ALASKA HIGHWAY PIPELINE INQUIRY (K. Lysyk Chairman 1977).

This trend towards "ad hockery" extended even to established environmental tribunals. Ontario's Environmental Assessment Board (EAB) has a statutory mandate to hold public hearings under the Environmental Protection Act on applications for licences to operate waste disposal facilities;[24] under the Ontario Water Resources Act on applications to construct and operate sewage treatment plants;[25] and since 1975 it has been charged with assessing other major projects under the Environmental Assessment Act.[26] Nevertheless, the Board occasionally receives special assignments from the provincial government by Order-in-Council: from 1973 to 1980, five such special hearings were held.[27]

The *ad hoc* nature of the most recent special EAB hearing angered parties to it who challenged the Board's jurisdiction. In February, 1979, the provincial cabinet appointed the Board to sit as a Commission of Inquiry into the burning of PCBs at St. Lawrence Cement Company in Mississauga, Ontario.[28] By this time the Environmental Assessment Act, 1975 had been law for over three years. This Act provided for hearings by the EAB before licensing major projects, but the provincial government had referred no projects to the Board under the Act which would require a more detailed examination of alternative methods of disposing of this toxic substance than was authorized by the terms of reference of the Order-in-Council establishing the Inquiry. Various representatives of the public interest resented the way that the provincial government continually bypassed the appropriate legislation for assessing environmental effects. On the grounds that the Public Inquiries Act, 1971,[29] under which the Commission was constituted, can be used only when no specific legislation covering the same subject-matter exists, the Canadian Environmental Law Association (CELA) and the City of Mississauga challenged the hearing. They claimed that the Board was compelled to proceed according to the requirements of the Environmental

---

[24] S.O. 1971, c. 86, *as amended by* S.O. 1972, c. 106, ss. 7, 8; S.O. 1974, c. 20, s. 11; S.O. 1975, c. 70, ss. 3, 4.

[25] The Board was established under s. 9(*a*) of the Ontario Water Resources Commission Act, R.S.O. 1970, c. 332 (renamed The Ontario Water Resources Act by The Government Reorganization Act, 1972, S.O. 1972, c. 1, s. 70) as the Environmental Hearing Board, and was renamed the Environmental Assessment Board when the Environmental Assessment Act, 1975, S.O. 1975, c. 69 [hereinafter cited as the Environmental Assessment Act] was passed. Its hearing functions are set out in ss. 43(1), 43(10), 44(1) and 61 of The Ontario Water Resources Act.

[26] S.O. 1975, c. 69.

[27] The first four hearings are those mentioned in EMOND, *supra* note 6, at 132, n. 2.

[28] On Feb. 22, 1978, a panel of the Environmental Assessment Board was authorized to look into the proposal to burn PCBs by P.C. 527-78. A minor change in government procedure was made by P.C. 2333-78 dated Aug. 9, 1979. The proceedings were placed under the Public Inquiries Act, 1971, S.O. 1971, c. 49, by P.C. 449-79 on Feb. 14, 1979. The Canadian Environmental Law Association had written to the Ontario Minister of the Environment on May 2, 1978 asking him to place this matter under the Environmental Assessment Act, S.O. 1975, c. 69, and he replied on May 8, 1978, refusing to do so because this was a "private" undertaking.

[29] S.O. 1971, c. 49, s. 2.

Assessment Act rather than its more restricted terms of reference. The Divisional Court ruled that the Act did not apply, and CELA has appealed this decision to the Ontario Court of Appeal.[30]

The failure of *ad hoc* processes to evolve into standard procedures as quickly as Estrin expected may have been a result of governmental reluctance to accept that environmental decisions often involve real conflicts and therefore require a specialized forum for resolution. In addition, other government departments and agencies may be reluctant to relinquish any of their power to the Department or Ministry of the Environment, which is traditionally a junior ministry under the authority of a weak minister. However, this failure does not imply the decline or stagnation of environmental law in general.

Around 1978, government and industry representatives began to voice concerns that the decline in economic growth and energy shortages would be exacerbated by strict enforcement of environmental standards.[31] The perceived "over-regulation" of industry and commerce, the feared curtailment of production, plant closures as a result of requirements to install pollution abatement equipment, and the length, complexity, and cost of environmental studies and public hearings became common themes of government and industry statements.

However, the predicted shift in governmental priorities away from environmental protection did not materialize. To some extent, the prognosis that environmental controls would have adverse effects was counterbalanced by statements of labour leaders: for example, a representative of the Ontario Federation of Labour stated that the "jobs versus environment" controversy is industry "blackmail".[32] Studies have also shown that environmental requirements have had little or no adverse impact on the economy and that their negative effects are often

---

[30] *Re* Canadian Environmental Law Ass'n and Pitura, 9 C.E.L.R. 41 (Ont. Div'l Ct. 1979). Leave to appeal was granted by the Court of Appeal on Jan. 21, 1980.

[31] For example, Hon. George R. McCague was quoted in his first interview after being sworn in as Minister of the Environment in Ontario as saying "that he felt Ontario's environmental laws may be holding back development of industry in the province and that 'over-regulation' of the environment has concerned him for some time". The Globe and Mail (Toronto), Jan. 25, 1978, at 40, col. 3. Mr. McCague's tenure as Minister of the Environment was short-lived. In less than six months the Premier shifted him to a new portfolio when environmental groups and both opposition parties called for his resignation after he announced that Inco Ltd. in Sudbury would be allowed to continue emitting 3,600 tons of sulphur dioxide into the air every day instead of complying with a 1970 order to reduce it to 750 tons a day by the end of 1978. The Globe and Mail (Toronto), Aug. 1, 1978, at 4, col. 1; The Toronto Star, Aug. 5, 1978, at C1, col.. 1; The Toronto Star, Aug. 19, at A1, col. 2.

Federal Minister of Energy Alastair Gillespie also suggested in Dec., 1977 that a lay-off of 2,300 workers in Sudbury by Inco Ltd. because of poor markets was caused by Ontario's pollution abatement program and urged that controls be cut back. The Toronto Star, July 17, 1978, at A10, col. 1. For the opposite view, *see* Len Marchand, *No Conflict Between Environment and Jobs*, Environment Canada Press Release (Feb. 20, 1978).

[32] *E.g.*, comments of John Eleen, Research Director of the Ontario Federation of Labour, made at the C.L.C. conference on Jobs and the Environment (Feb. 19-21, 1978).

outweighed by their benefits.[33] This does not support the contention that Canadian business is "over-regulated".[34] More importantly, perhaps, there were strong public and media reactions against attempts to curtail environmental protection. These were possibly stimulated by a series of events that overshadowed the largely unsubstantiated statements about the contribution of environmental measures to economic and energy problems: prominent environmental disasters like the evacuation of Seveso, Italy after a discharge of dioxin; and closer to home, the discovery of "acid rain", Three Mile Island, Love Canal, and the Mississauga train derailment. In any event, the outpouring of legislation and case law that had begun in the late 1960's was continuing as we entered 1980.

The practice of environmental law also continued to grow, although not dramatically. The staff of the Canadian Environmental Law Association increased from one lawyer to three, a West Coast Environmental Law Association was formed and a newly-established Public Interest Advocacy Centre made environmental cases a significant component of its caseload. In addition, the staffs of native organizations such as the Inuit Tapirisat of Canada, the Northern Quebec Inuit Association, and Grand Council Treaty No. 9 in Ontario now include lawyers whose work mainly involves environmental issues and land claims. However, unlike the United States where the Natural Resources Defense Council, the Environmental Defense Fund, and other public interest organizations specializing in environmental issues each list dozens of lawyers on their letterhead, Canada probably supports fewer than a dozen full-time public interest environmental lawyers. In private practice, only one lawyer restricts his work solely to fighting potentially harmful projects on behalf of citizens' groups. The main area of growth has been within government and legal staffs of large corporations; there has also been an increasing expertise within the large law firms that serve these clients.

---

[33] *E.g.*, a study by Ben-David *et al.*, described in *Health Benefits from Stationary Air Pollution Control Appear Substantially More Than Costs*, U.S. Environmental Protection Agency Press Release (Mar. 29, 1979); DATA RESOURCES INC., THE MACROECONOMIC IMPACT OF FEDERAL POLLUTION CONTROL PROGRAMS, 1978 ASSESSMENT (commissioned by the U.S. Environmental Protection Agency and the Council on Environmental Quality, 1979); Donnan, *Pollution Abatement Costs: A Drop in the Bucket?*, in PROCEEDINGS, 25TH ONTARIO INDUSTRIAL WASTE CONFERENCE 22 (1978).

[34] ECONOMIC COUNCIL OF CANADA, RESPONSIBLE REGULATION — AN INTERIM REPORT (S. Ostry Chairman 1979). This report arises out of the Regulation Reference by the First Ministers given to the Council in mid-1978. To be more precise, the Council's investigations suggested that there is no consensus as to whether there is too much or too little regulation, that the burden of regulation by two or more levels of government may be having "serious adverse effects on the efficiency of Canadian firms and on the allocation of resources and distribution of incomes", that the validity of the impression that there is too much regulation cannot be tested empirically because the optimal amount of regulation involves value judgments, and that improvements in the "machinery" by which regulation is produced and perpetuated may have greater potential to improve regulation than total or partial deregulation.

II. What is Environmental Law?

Although there is ample evidence that environmental law exists and continues to grow, its boundaries are far from fixed. Environmental issues may be resolved in civil and criminal courts, specialized environmental tribunals, coroner's inquests, and occasionally in front of boards like the Provincial Liquor Licensing Board (which can regulate noise pollution from taverns). The laws that affect the management of the environment range over torts, municipal and land use planning, transportation legislation, energy law and policy, natural resources management, constitutional law, and international law.

The nature of environmental law depends on how it is approached. One approach is to identify environmental law as those aspects of other branches of law that affect the environment — the torts of nuisance and riparian rights, for instance — together with some aspects of other traditional areas such as constitutional law, administrative law, municipal and land use planning law, and international law.

A second approach is to identify specific policies, institutional arrangements, and rights and duties which cut across a variety of substantive areas of law but which are particularly important to the quality and fairness of environmental decisions. Using this method, such matters as public participation in setting standards and making regulations, *locus standi* access to judicial review of the proceedings of subordinate agencies, freedom of information, and burdens of proof are central concerns of environmental law. This approach focuses on legal and process issues rather than environmental concerns.

A third approach is to recognize laws, doctrines, rights, and procedures that are unique to environmental concerns, such as a substantive right to environmental quality, the public trust doctrine, environmental impact assessment, and specialized pollution control and wildlife preservation statutes found at the provincial and federal levels.

Fourth, one might focus on environmental rather than legal issues. By this approach, one would categorize the relevant laws on the basis of the resource to be managed or the contaminant or activity to be controlled. Thus, environmental law would consist of a collection of laws governing, for example, air, water, noise, pesticides, management of parkland and other aspects of land use planning, waste disposal sites, and "visual pollution". They would also regulate various resource and energy issues such as logging, solar rights, mining, management of pits and quarries, and regulation of oil, gas, and nuclear energy.

Finally, there is what might be called the "storefront law" approach. In practising environmental law, one can allow potential clients to define what they consider their "environment" to be and their perceived threats to the quality of this environment. The work of the environmental lawyer, then, would be to identify and apply the laws that are available to protect those interests which the client identifies as its environmental amenities. This body of law, which would expand and

contract according to people's perceptions of the threat to their health and the quality of life at any given time, would be environmental law. In essence, this is the approach adopted by the Canadian Environmental Law Association over the years with the result that its staff has advised on matters ranging from mercury pollution and destruction of parkland by highways and factory pollution, to barking dogs, "muzak" in the Toronto subway, deprivation of potential solar energy users' access to sunlight, electrically-illuminated advertising signs in bus shelters, and threats by a property owner to sue his neighbour for nuisance because the neighbour's tree was dropping leaves into his backyard swimming pool.

Environmental law might be viewed conceptually — to borrow a phrase from Professor Hart — as having a "core" and a "penumbra".[35] From one approach, the core might be considered the protection of health and the penumbra might be "quality of life" or aesthetic issues. Looked at another way, the core might be pollution, the penumbra energy, land use planning, and management of natural resources. Viewed in yet another manner, the core might be a substantive right to environmental quality and environmental impact assessment of any threatening project, surrounded by a penumbra of process reforms such as *locus standi*, access to information, funding of participation, and class actions.

According to the "storefront" approach, any preconception of the parameters of environmental law would be necessarily incomplete. Environmental-legal issues would be whatever the market for legal services requires them to be. For example, before the train derailment that created the possibility of the release of toxic chlorine gas from a tanker car and led to the evacuation of 240,000 Mississauga residents for up to a week, the only complaints ever received about trains by the Canadian Environmental Law Association related to their noise. Overnight a new environmental-legal issue was born in the minds of the public: the regulation of transportation of dangerous goods.

In fact, there is no "correct" way to characterize environmental law. This relatively new area of law is still growing and changing. It is no more stable than the list of environmental problems, which seems to expand almost daily. The "acid rain" phenomenon, for instance, received little scientific attention ouside Scandinavia until 1976, no public expressions of political concern in Canada until 1977, and virtually no media coverage until 1978.[36] However, in 1980 the Canadian and United States Governments consider it a major threat to ecological

---

[35] H. HART, THE CONCEPT OF LAW, ch. 7 (1961).

[36] For a chronology of recent acid rain developments, *see* PROCEEDINGS OF THE ACTION SEMINAR ON ACID RAIN, available from the Federation of Ontario Naturalists, 355 Lesmill Road, Don Mills, Ontario. One of the earliest public statements by a Canadian politician was the 1977 comment by Federal Environment and Fisheries Minister Romeo LeBlanc that acid rain was "an ecological time bomb". One of the first articles in the Canadian press was published in The Sunday Star (Toronto), Oct. 23, 1977, at A2, col. 1. *See Acid Rain Batters Canada*, 6 C.E.L.A. NEWSLETTER 85 (1977). A bibliography on acid rain research is also available from the Federation of Ontario Naturalists.

stability: an international air pollution treaty for its control is an urgent priority. Similar statements could be made about energy shortages, PCBs, PBBs, radiation, solar rights, and many other current concerns.

One way to look at environmental law and its progress over the past five years is through the concept of an "environmental bill of rights".[37] An environmental bill of rights is a collection of statutory provisions, rules of procedure, and evidentiary requirements, doctrines, rights, and duties which many commentators have felt would advance the protection of the environment if implemented. There are several versions of the "environmental bill of rights", differing in detail, but containing many similarities in approach and attitude. For example, legislation drafted for the State of Michigan by Professor Joseph Sax, a version of which was passed in 1970 as the Michigan Environmental Protection Act (MEPA), has been described as "an environmental bill of rights".[38] MEPA declares that air, water, and other natural resources constitute a public trust and any member of the public has standing to bring an action for declaratory or injunctive relief against anyone whose activities threaten to pollute or impair the environment. Once the plaintiff demonstrates that the defendant's conduct is likely to harm the environment, the Act imposes an onus on the defendant to establish that there is no feasible and prudent alternative to his activities and that they are consistent with the public interest. In such an action, the court may determine the adequacy of existing pollution standards and if it finds them to be deficient, impose a new standard. MEPA has served as the model for similar legislation in several other states.

In Canada, a number of variations on this theme have been proposed by two sections of the Canadian Bar Association,[39] in a Private Member's Bill introduced by the Leader of the Opposition in the Alberta Legislature,[40] in a similar, but broader, Private Member's Bill introduced

---

[37] The term "environmental bill of rights" appears to have originated in the United States around 1970. The National Environment Policy Act of 1969, 42 U.S.C. §4321 (1970), for example, has been called such: Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUT. L. REV. 230 (1969-70). *See also* Chambers, *Private Action Under the Public Trust: An Environmental Bill of Rights for California*, 2 PAC. L.J. 620 (1971).

[38] MICH. COMP. LAWS ANN. 691.1201-1207 (West Supp. 1977), described as an "Environmental Bill of Rights" by Kennedy, *Forward* to ESTRIN & SWAIGEN, *supra* note 7, at *x*. For studies of this legislation in operation, *see* Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICHIGAN L. REV. 1004 (1972); Sax & DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974); Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizen Suits*, 53 J. OF URB. L. 589 (1976).

[39] Draft bill, prepared by Edmonton Subsection, Environmental Law Section, Alberta Branch, Canadian Bar Association (May 4, 1976). The Environmental Law Section of the British Columbia Branch of the CBA gave this draft Environmental Bill of Rights endorsement and support in principle May 13, 1977: Correspondence from P.M. Steele, Chairman, Environmental Law Section, B.C. Branch to David Kilgour, Environmental Law Section, Northern Alberta Section, CBA, May 13, 1977.

[40] The Environmental Bill of Rights, 1979, Bill 222, 19th Leg. Alta., 1st sess., 1979 (never received 1st reading) (Mr. R. Clark).

in 1979 by the Leader of the Opposition in Ontario,[41] and in publications by the Canadian Environmental Law Association.[42]

We will now turn to recent developments in environmental law. These will be seen first in the context of the components of an environmental bill of rights like the one proposed by CELA, and secondly, from the perspective of control of specific activities and the management of specific resources. Finally, selected decisions of the Supreme Court of Canada will be reviewed.

III. Towards an Environmental Bill of Rights for Canada: Five Years of Plodding Progress

The environmental bill of rights proposed by the Canadian Environmental Law Association followed the second and third approaches described above in defining the nature of environmental law. It consisted of a combination of explicitly "environmental" remedies and procedures such as a substantive right to environmental quality, environmental impact assessment and public trust, together with legal, administrative, and policy matters that affect environmental as well as other social concerns. The latter included *locus standi*, class actions, access to government information, reverse onus in litigation and approval processes, funding of public participation before boards and tribunals, relief from onerous party and party costs in litigation, public participation in setting environmental standards, and greater accountability of administrative agencies and legislators through such mechanisms as ombudsmen and greater access to judicial review.

Over the past five years the reaction of Canada's legislative bodies, administrative agencies, and courts to these issues has ranged from rejection or indifference in some cases, to acceptance in others. This part will briefly discuss some of the developments in regard to these issues that may directly or indirectly influence environmental decision-making. In some cases, the developments have taken place outside the environmental context, but may nevertheless have a significant impact on future environmental decisions, policies, and litigation.

A. *Environmental Impact Assessment*

Of all the issues identified by CELA and other commentators as beneficial to improved environmental decisions, inclusion of environmental impact assessment as a necessary component of the decision-making process has made the most dramatic progress. The few

---

[41] The Ontario Environmental Rights Act, 1979, Bill 185, 31st Leg. Ont., 3d sess., 1979 (1st reading Nov. 20th, 1979) (Mr. S. Smith).

[42] *E.g., CELA Calls for Environmental Bill of Rights*, 2 C.E.L.N. 37 (1973); Estrin & Swaigen, *supra* note 6, at 458-81.

environmental impact assessment requirements in existence towards the end of 1974, and the constraints on their effectiveness, were described in Estrin's earlier survey of environmental law. Almost all impact assessment procedures were discretionary and were limited in scope and subject-matter. By 1980, most provinces claim to have adopted or are considering adopting a policy of environmental impact assessment, even though, in some cases, what the provinces describe collectively as their environmental impact assessment process or policy is nothing more than a collection of miscellaneous policies and statutory provisions that do not fit together in any comprehensive or cohesive way.[43]

In July of 1975, Ontario became the first province to pass a statute requiring mandatory environmental impact assessment of all provincial and municipal government undertakings, unless exempted by the cabinet, and of major private undertakings designated by regulation. The Environmental Assessment Act[44] requires the proponents of such undertakings to prepare a study and submit it to the Minister of the Environment who then coordinates a review of the study by all relevant government departments. Following this review process, the Ministry must make both the assessment and the government review available to the general public and must accept submissions from any member of the public. If he considers the assessment inaccurate or incomplete, the Minister may refuse to accept it and order the proponent to do further studies.

There are two main decisions in the process: the acceptance of the environmental assessment document just described and approval of the project. Any person may request a public hearing before the Environmental Assessment Board dealing with either or both of these questions. The Board may accept the assessment or may amend it. It may also give unqualified approval to the undertaking, approve it subject to terms and conditions, or reject it. The Board has decision-making and not merely recommendatory powers. However, its decisions may be appealed to the Minister of the Environment and the cabinet, who may affirm the decision, vary, or reject it, substitute their own decision, or require the Board to hold new hearings and reconsider its decision.

On paper, the Environmental Assessment Act appears to embody many of the principles for environmental impact assessment recommended by the Canadian Environmental Law Association.[45] CELA

---

[43] The Environment and Resource Ministries of each of the provinces and the Federal Government have described their procedures in GOVERNMENT OF BRITISH COLUMBIA, ENVIRONMENTAL IMPACT ASSESSMENTS IN CANADA: A REVIEW OF CURRENT LEGISLATION AND PRACTICE (prepared for the Canadian Council of Resources and Environment Ministers, 1977). *See also* EMOND, *supra* note 6. On environmental impact assessment generally, an excellent bibliography is A. ARMOUR, INFORMATION RESOURCES FOR ENVIRONMENTAL IMPACT ASSESSMENT (1979).

[44] S.O. 1975, c. 69. For further comments on this Act, see EMOND, *supra* note 6, ch. 2; ESTRIN & SWAIGEN, *supra* note 6, ch. 3; Samuels, *Environmental Assessment in Ontario: Myth or Reality?*, 56 CAN. B. REV. 523 (1978).

[45] CANADIAN ENVIRONMENTAL LAW ASSOCIATION, PRINCIPLES FOR ENVIRONMENTAL IMPACT ASSESSMENT (1973). *See also* Castrilli, Estrin & Swaigen, *An*

lobbied vigorously for its introduction and for amendments which would enhance both the independence of the Board and effective public participation, while imposing limitations on the government's ability to approve projects with significant environmental impact without a prior assessment. In one crucial respect, CELA failed to achieve its goal. The bill originally tabled in the legislature made projects subject to assessment only at the government's discretion.[46] The government eventually succumbed partially to the arguments of environmentalists, supported by numerous municipalities, public interest groups, and the press, that all major public or private projects including government projects except those explicitly exempted[47] should be subject to the Act. However, the government then delayed proclamation of key portions of the Act for over a year, and exempted all municipal projects and many other government projects within a number of broad categories.

By July, 1978, three years after the Act had been passed, only five assessments of government projects had been submitted to the Ministry of the Environment. Only three private projects had been designated for assessment.[48] As of January 31, 1980, forty-nine assessment documents had been submitted to the Ministry of the Environment. Twenty-two of them were not assessments of individual projects; instead they were "class assessments", that is, descriptions of the impact to be expected from categories of projects, such as bus stations and canoe routes, plus steps that generally might be taken to reduce their impact.[49] As of May 1, 1980, municipal projects were still exempt from the Act and none of the assessments of the designated private projects had yet been submitted to the Minister of the Environment for review. The first hearing under the Environmental Assessment Act began on April 22, 1980.[50] Additionally, the government had refused requests for assessment of several major projects.[51]

Environmental Impact Assessment Statute for Ontario with Commentary, in ENVIRONMENTAL MANAGEMENT AND PUBLIC PARTICIPATION 319 (P.S. Elder ed. 1975).

[46] For a description of the Bill tabled for first reading on Mar. 24, 1975 (LEG. ONT. DEB., 29th Leg., 5th Sess., No. 9, at 334) and amendments requested by the Canadian Environmental Law Association, see *The Environmental Assessment Act (Bill 14) — Only the Title is Right*, 4 C.E.L.N. 2 (1975).

[47] The legislative process and public hearings to which the Environmental Assessment Act was subjected and the submissions of various interest groups are described in a two-part article by Castrilli, *Ontario Passes Canada's First Environmental Assessment Act*, 4 C.E.L.N. 121 (1975), and 5 C.E.L.N. 29 (1976).

[48] The Globe and Mail (Toronto), July 12, 1978, at 6, col. 1; The Globe and Mail (Toronto), July 13, 1978, at 3, col. 1; The Globe and Mail (Toronto), July 28, 1978, at 6, col. 5.

[49] LEG. ONT. DEB., 31st Leg., 4th Sess., No. 9, at 295-97 (1980).

[50] Proposed Colonel Samuel Bois Smith Waterfront Area Master Plan, Etobicoke, Ontario, EA File Number 1-78-0003-000. The proposal involves filling Lake Ontario shoreline with construction debris to create parkland.

[51] For example, the proposed road through Elora Gorge Conservation Area and the bridge over the Gorge; Darlington Nuclear Generating Station; an application for a licence to establish a sanitary landfill site, believed to be the largest in North America, at

In January, 1978, a committee overseeing the implementation of the Act was given a mandate by the Premier of Ontario to receive complaints from the public about exemptions from the Act and to make recommendations as to whether an assessment should be done in each case.[52] It has recommended assessment of several projects which would otherwise be exempt. The government has now announced its intention to introduce an Omnibus Bill in the spring of 1980 to streamline public hearing procedures under the Environmental Assessment Act, the Planning Act,[53] and five other statutes to avoid duplication of proceedings.[54] If the Omnibus Bill curtails rights to a public hearing under the Environmental Assessment Act, it would be assuming a need for change before giving a fair chance to the present provisions of the Act which provide for extensive public participation.

Quebec amended its Environment Quality Act[55] in 1978 to broaden the requirements for environmental impact assessment. An environmental impact assessment and review procedure is to be set out in regulations issued by cabinet. Before work can be carried out on designated projects, this procedure must be followed and a certificate of authorization must be obtained from the cabinet. A Bureau d'audiences publiques sur l'environnement has been created to hold public hearings on projects subject to environmental impact assessment.

At the federal level, the National Energy Board's discretionary power to require an environmental impact assessment, formerly under a broad but vague power to consider any aspect of the public interest, was given explicit recognition in 1975. Changes to the Board's Rules of Practice and Procedure now require applicants for a certificate to construct an oil or gas pipeline to file an assessment of the impact of the pipeline on the existing environment, and a statement of the measures proposed to mitigate the impact.[56]

The federal Environmental Assessment Review Process (EARP), established by a cabinet directive in December, 1973,[57] has been criticized since its inception. The process is intended to "ensure that the

---

Maple, Ontario; a Disneyland-like theme amusement park in Maple; and the burning of PCBs in a cement kiln in Mississauga. *See supra* notes 28-30 for further information about this proposal.

[52] *Committee will Review Environmental Assessment Act Exemptions*, 3 C.E.L.A. NEWSLETTER 81 (1978).

[53] R.S.O. 1970, c. 349.

[54] Speech from the Throne (Hon. P.M. McGibbon, Lieut.-Gov.), LEG. ONT. DEB., 31st Leg., 4th Sess. No. 1, at 7 (1980).

[55] S.Q. 1972, c. 49, *as amended by* S.Q. 1978, c. 64.

[56] S.O.R./75-41 (109 Can. Gazette, Pt. II, 122).

[57] For the contents of the Cabinet Directive and a description of EARP, *see* FEDERAL ENVIRONMENTAL ASSESSMENT AND REVIEW OFFICE, REVISED GUIDE TO THE FEDERAL ENVIRONMENTAL ASSESSMENT AND REVIEW PROCESS 12 (1979); FEDERAL ENVIRONMENTAL ASSESSMENT AND REVIEW OFFICE, GUIDE FOR ENVIRONMENTAL SCREENING (1978); FEDERAL ENVIRONMENTAL ASSESSMENT AND REVIEW OFFICE, GUIDELINES FOR PREPARING INITIAL ENVIRONMENTAL EVALUATIONS (1976). *See also* EMOND, *supra* note 6, ch. 5; ESTRIN & SWAIGEN, *supra* note 6, at 53-61.

environmental effects of federal projects, programs and activities are assessed early in their planning, before any commitments or irrevocable decisions are made''.[58] However, lacking statutory authority to compel an assessment in any specific case, the Minister must rely on the cooperation of the project initiator or his cabinet colleagues to ensure that projects are assessed and that the findings of the assessment are implemented. The criticisms that have been levelled against EARP are described by Professor Emond in his book on environmental assessment. Emond concludes, accurately and fairly in the author's opinion, that ''[f]irst, EARP seems to have been as bad as its critics have suggested [and s]econdly, the experience of almost five years under EARP has led to substantial, even dramatic, improvements in the way in which the Process is being administered''.[59]

These improvements, however, have not been sufficient to reduce the vulnerability of EARP to criticism by academics[60] and environmentalists.[61] In 1978, an Opposition environment critic introduced a Private Member's Bill intended to ensure that any potentially damaging federal project would undergo an assessment, that the public would have access to the assessment, that public hearings would be held, that funding would be available for intervenors at these hearings, and that the assessment process would be subject to time limits to avoid unnecessary delay.[62] The Ministry began an internal review of EARP in 1979 with a view to improving it, taking into account these criticisms.

The role of the Department of the Environment in environmental assessment was formally recognized in 1979. The Government Organization Act, 1979 gave statutory recognition to the obligation of federal government departments to carry out environmental impact assessments.[63] However, the Act does not address the central weaknesses of EARP: the lack of any explicit power in the Minister of the Environment to require an assessment without having to rely on the goodwill of the project initiator, the lack of clear procedures for implementing the Minister's statutory mandate, and the lack of certainty that the findings

---

[58] REVISED GUIDE TO THE FEDERAL ENVIRONMENTAL ASSESSMENT AND REVIEW PROCESS, *supra* note 57, at 1.

[59] EMOND, *supra* note 6, at 236. Emond analyses EARP extensively and makes reference to many of the written criticisms of the process, both published and unpublished.

[60] Criticism of EARP has continued to flow since Professor Emond's book was published. *See, e.g.*, William E. Rees, Reflections on the Environmental Assessment and Review Process (EARP), Aug. 1979, with minor revisions Nov. 14, 1979 (unpublished discussion paper prepared for the Canadian Arctic Resources Committee).

[61] Loveys, *Federal Assessment Process Weak*, in PROBE POST, Sept.-Oct. 1979, at 5 (a publication of Pollution Probe); D.G. Gamble, Canadian Arctic Resources Committee, The Federal Environmental Assessment and Review Process: Some Miscellaneous Thoughts, Mar. 1, 1979 (unpublished memorandum to file).

[62] The Environmental Impact Assessment Act, Bill C-236, 30th Parl., 2d sess., 1976 (1st reading Oct. 22, 1976). It was reintroduced as Bill C-458, 30th Parl. 4th sess., 1978-79 (Mr. Wenman).

[63] Government Organization Act, 1979, S.C. 1979, c. 13, s. 6 (proclaimed in force Apr. 2, 1979).

of the assessment will be taken into account in project design and construction.

Municipally, environmental impact assessment has not fared well. In Ontario, some municipalities have attempted to incorporate environmental considerations into the planning process through advisory environmental committees and through inclusion of conservation policies in their Official Plans.[64] However, a recent study of the conservation provisions in Official Plans revealed the Plans to be weak in their treatment of natural environment concerns.[65] Another study showed that the interest of municipalities in protecting the natural environment was circumscribed by their limited financial and legal ability to implement their policies.[66] The effectiveness of municipal environmental impact assessment procedures has also been constrained by the lack of political will to implement processes that impede development. In Ontario, municipalities have lobbied against being subjected to the Environmental Assessment Act. Section 653(1) of the City of Winnipeg Act of 1971[67] appeared to impose a clear duty on the city's executive policy committee to review every proposed public work that might significantly affect the quality of the human environment for its environmental impact, and to report to the council any adverse effects that could not be avoided and any alternatives to the proposed action. Residents made two unsuccessful attempts to use the courts to compel the executive policy committee to prepare environmental impact reviews of projects.[68] A third application, to quash a decision to construct a bridge on the grounds that the decision was made before an environmental review was done, was also unsuccessful.[69] Following these attempts and lobbying by municipal politicians, the legislature amended section 653 to make the assessment process completely discretionary and to remove the adequacy of the assessment from judicial scrutiny.[70]

B. *The Right to Environmental Quality and the Public Trust Doctrine*

Although environmental impact assessment, advocated by the Canadian Environmental Law Association, was widely accepted, two

---

[64] *E.g.*, Regional Municipality of Waterloo and Regional Municipality of Halton.

[65] T. MELYMUK & W. HUGHES, NATURAL ENVIRONMENTS IN ONTARIO MUNICIPAL PLANNING: PROGRESS AND PROSPECTS (Faculty of Environmental Studies, York University, 1976).

[66] R. LANG & A. ARMOUR, MUNICIPAL PLANNING AND THE NATURAL ENVIRONMENT (Summary Report to the Government of Ontario Planning Act Review Committee 1976).

[67] S.M. 1971, c. 105. The Act came into force on July 30, 1971, but parts of it, including s. 653, were not in force until Jan. 1, 1972.

[68] Stein v. City of Winnipeg, [1974] 5 W.W.R. 484, 48 D.L.R. (3d) 223 (Man. C.A.); Miller v. City of Winnipeg, 4 C.E.L.N. 167 (Man. Q.B.).

[69] Easton v. City of Winnipeg, 5 C.E.L.N. 137 (abr.), 69 D.L.R. (3d) 585 (Man. C.A. 1976).

[70] An Act to Amend the City of Winnipeg Act, S.M. 1977, c. 64, s. 129 (in force June 18, 1977). The gradual emasculation of the Winnipeg environmental impact assessment process is described in EMOND, *supra* note 6, at 168-86.

other cornerstones of CELA's environmental bill of rights have received little official sanction. CELA suggested that a substantive right to a clean, healthy, and attractive environment should be recognized as a basic civil liberty, with equivalent status to freedom of speech or religion, and that air, water, and other natural resources should be considered to be subject to a public trust. As such, government would not be free to authorize development or pollution of common resources by private interests unless it could establish that this would further the public interest.

The right to enjoy a clean environment and the public trust therein have been mentioned in private member's bills introduced in Alberta[71] and Ontario.[72] Amendments to Quebec's Environment Quality Act[73] in 1978 also made reference to a public right "to a healthy environment and to its protection, and to the protection of the living species inhabiting it". Unfortunately, the language of the relevant provision is so convoluted that one brief to the Parliamentary Commission studying the Bill called the provision a tautology, which states merely that "on a droit à la qualité de l'environnement dans la mesure où la loi donne un droit à la qualité de l'environnement".[74]

Although the public trust concept is well established in the United States,[75] it was rejected the only time it appears to have been considered by a Canadian court.[76] In a paper to be published shortly, Constance Hunt has reviewed a variety of statutory provisions and judicial doctrines that could form the basis for the judicial development of a public trust doctrine in Canadian courts. However, Professor Hunt has concluded that the establishment of a public trust doctrine will probably require legislation rather than judicial activism.[77] In a recent paper, the author of this survey came to a similar conclusion about the creation of a substantive right to environmental quality.[78]

---

[71] The Environmental Bill of Rights Act, 1979, Bill 222, 19th Leg. Alta., 1st Sess., 1979 (never received 1st reading).

[72] The Ontario Environmental Rights Act, 1979, Bill 185, 31st Leg. Ont., 3d Sess., 1979 (1st reading Nov. 20, 1979).

[73] S.Q. 1972, c. 49, *as amended by* S.Q. 1978, c. 64, s. 19(*a*).

[74] "[Y]ou have the right to environmental quality to the extent that the law gives you the right to environmental quality." (J. Swaigen, trans.). Poirier & Krauss, *Le Projet de Loi 69 Modifiant la Loi sur la Qualité de l'Environnement*, 8 C.E.L.R. 49, at 57 (abr. version of brief accompanied by a synopsis and abr. text of the brief in English, P. Larocque ed.).

[75] The seminal article on the public trust doctrine is Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICHIGAN L. REV. 471 (1970).

[76] Green v. The Queen, [1973] 2 O.R. 396, 34 D.L.R. (3d) 20 (H.C. 1972).

[77] C. Hunt, The Public Trust Doctrine in Canada, May 1980 (unpublished).

[78] J. Swaigen & R. Woods, A Substantive Right to Environmental Quality, Aug., 1980 (unpublished). This article and the Hunt article, *id.*, were commissioned by the Canadian Environmental Law Research Foundation with the support of the Donner Canadian Foundation. CELRF expects to publish the papers in a book in the Spring of 1981.

C. *Public Participation in Standard-setting*

The Canadian Environmental Law Association has suggested that the law must give citizens the right to participate in setting standards of environmental quality, such as acceptable levels of pollution, and the right to demand that these standards be reviewed when new technology is developed, or new information comes to light that brings the adequacy of the current standard into question.

In Canada before 1975, the only requirements for prior publication of environmental regulations, and the only opportunity for the public to make submissions to the Minister before the regulations were promulgated, were found in the federal Clean Air Act and Quebec's Environment Quality Act.[79] In addition, the British Columbia Pollution Control Board, which sets standards for levels of contaminants, had a policy of holding public hearings to consider pollution levels although it was under no legal obligation to do so.[80]

Since 1975, the federal government has extended both the prepublication of regulations and the right to public hearings to its Environmental Contaminants Act[81] and the Nuclear Control and Administration Act,[82] a Bill which was introduced in 1977 but later withdrawn. Some agencies have also begun to voluntarily permit review of proposed regulations. For example, the Atomic Energy Control Board has recently released, for public comment, proposed measures to prevent sabotage and theft of nuclear materials.[83] In 1979, Ontario's Minister of the Environment offered to publish in the Ontario Gazette regulations to implement the new Part VIII-A of the Environmental Protection Act[84] and accept public comments. This was the compromise offered in arguing against a public scrutiny amendment to the Act as proposed by an Opposition party member.[85] The Ministry has also informally asked the Canadian Environmental Law Association for comments on proposed regulations under the Environmental Assessment Act on several occasions.[86] The idea of prior public review of regulations has also been advocated

---

[79] Clean Air Act, S.C. 1970-71-72, c. 47; Environment Quality Act, S.Q. 1972, c. 49.

For a survey of Canadian and American legislation providing for public participation in setting environmental standards, *see* Lax & Wood, *Public Participation in the Setting of Criteria and Standards*, 5 C.E.L.N. 65 (1976). This is reprinted from the Proceedings of the 1976 Air Pollution Control Association Conference entitled Air Quality: Criteria, Standards and Indices.

[80] This policy is described in a Letter to the Editors from James Nielsen, B.C. Minister of the Environment, 5 C.E.L.N. 168 (1976).

[81] S.C. 1974-75-76, c. 72, ss. 5 and 6.

[82] Bill C-14, 30th Parl., 3d sess., 1977, s. 56(2) (1st reading Nov. 24, 1977).

[83] The Globe and Mail (Toronto), Feb. 22, 1980, at 10, col. 4.

[84] S.O. 1971, c. 86.

[85] LEG. ONT. DEB. (unrevised), 31st Leg., 3d Sess. (Standing Resources Development Committee hearings on the Environmental Protection Amendment Act, 1979, Bill 24, at R-1000-1 to R-1010-1 (Dec. 5, 1979)).

[86] S.O. 1975, c. 69.

recently by publication of a background paper prepared for Ontario's Royal Commission on Freedom of Information[87] and by a front-page article and editorial in the Globe and Mail.[88]

Review of the adequacy of existing regulations has received less attention. However, such review has been proposed in the Alberta Environmental Bill of Rights, 1979[89] and the Ontario Environmental Rights Act, 1979.[90] In addition, the Ontario Environment Ministry has recently initiated a policy of holding public hearings before relaxing the requirements of any "control order" which calls for a polluting operation to reduce emissions or install specific pollution control devices within a certain time limit.[91]

D. *Freedom of Information*

Access to government information has been a focal point for law reform activity and the subject of numerous reports and studies over the past five years. Nova Scotia[92] and New Brunswick[93] have passed freedom of information statutes. Federally, the former Liberal Government promised legislation but did not introduce any before it was defeated in January, 1979. The Conservative Government that followed introduced a freedom of information statute, but it died on the order paper when that Government was defeated in December, 1979. The Liberals, subsequent to their re-election, introduced a further statute on July 17, 1980.[94] The Ontario Government appointed a Royal Commission on Freedom of Information and Privacy in 1975[95] and has promised to introduce information legislation.[96] The Commission is expected to report in the autumn of 1980, at which time it is also anticipated that a bill will be tabled in the Legislature.

E. *Locus Standi*

Broader access to the courts in public interest cases is central to the efficacy of almost every other law reform that may be suggested to

---

[87] D. MULLEN, RULE-MAKING HEARINGS: A GENERAL STATUTE FOR ONTARIO? (Research Publication No. 9 prepared for Ontario Commission on Freedom of Information and Privacy, 1979).

[88] The Globe and Mail (Toronto), Mar. 20, 1980, at 1, col. 1; The Globe and Mail (Toronto), Apr. 3, 1980, at 6, col. 1. *See also* E.F. Ryan, Cabinet's Power Becoming Larger and Vaguer, Letters to the Editor, The Globe and Mail (Toronto), Apr. 12, 1980, at 7, col. 1.

[89] Bill 222. 19th Leg. Alta., 1st sess., 1979 (never received 1st reading).

[90] Bill 185. 31st Leg. Ont., 3d sess., 1979 (1st reading Nov. 20, 1979).

[91] Statement of Harry C. Parrot, Ontario Minister of the Environment, Introduction to the Ministry of the Environment Estimates, 1979-80, Oct. 16, 1979, at 3.

[92] Freedom of Information Act, S.N.S. 1977, c. 10 (in force Nov. 1, 1977).

[93] Right to Information Act, S.N.B. 1978, c. R-103 (in force Jan. 1, 1980).

[94] Freedom of Information Act, Bill C-15, 31st Parl., 1st sess., 1979 (1st reading Oct. 24, 1979); Access to Information Act and the Privacy Act, Bill C-43, 32d Parl., 1st sess., 1980 (1st reading Jul. 17, 1980).

[95] D. Carleton Williams is Chairman of the Royal Commission which was established by P.C. 920-77 (1977). Its Final Report was made public on Sept. 18, 1980.

[96] The Globe and Mail (Toronto), Oct. 26, 1979, at 2, col. 7.

improve environmental decision-making. With the recent increase in public participation before regulatory boards and tribunals and in other administrative processes, *locus standi* has become a central issue. Once a relatively minor aspect of administrative law, it is now the subject of a flood of books, articles, and studies.[97]

The decisions of *Thorson v. Attorney-General of Canada (No. 2)*[98] and *Nova Scotia Board of Censors v. McNeil*[99] appeared to open the door to much wider access to the courts for a review of the activities of government departments and agencies. However, it is unclear whether these cases merely created a narrow exception, in constitutional cases, to the rule that standing requires a special proprietary or pecuniary interest, or whether they stand for the proposition that in all cases where the applicant has no greater interest than the general public, the court has discretion to grant standing. With the exception of Ontario,[100] most courts have taken the latter view.[101] In any event, as a result of *dicta* in the *McNeil* case that the court should rule on the merits of the case at the same time as deciding standing,[102] the barrier has now lost much of its sting. A denial of standing no longer necessarily means a denial of a ruling on the merits. Nevertheless, the issue is still raised frequently,[103] and often successfully, by respondents. Curiously, the courts appear to have never decided in favour of an applicant and against the legality of a government decision, while finding at the same time that the applicant lacked standing, and therefore any remedy. Presumably in a case involving a serious illegality, the court would be reluctant to summarily deprive the applicant of even a declaration by denying standing.

---

[97] *E.g.*, LOCUS STANDI (L. Stein ed. 1979); S. THIO, LOCUS STANDI AND JUDICIAL REVIEW (1971); Giroux, *L'interêt à poursuivre et la protection de l'environnement en droit québécois et canadien*, 23 MCGILL L.J. 293 (1977); Mullan, *Standing After McNeil*, 8 OTTAWA L. REV. 32 (1976); Johnson, *Locus Standi in Constitutional Cases After Thorson*, [1975] PUBLIC LAW 137; Swaigen & Block, *Standing for Citizens: An Idea Whose Time Has Come*, 10 GAZETTE 352 (Dec. 1976); LAW REFORM COMMISSION OF AUSTRALIA, ACCESS TO THE COURTS — 1 STANDING: PUBLIC INTEREST SUITS (1978); NEW ZEALAND LAW COMMISSION, REPORT ON REMEDIES IN ADMINISTRATIVE LAW (1976).

[98] [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1 (1974).

[99] [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632 (1975).

[100] Rosenberg v. Grand River Conservation Auth., 12 O.R. (2d) 496, 69 D.L.R. (3d) 384 (C.A. 1976).

[101] *E.g.*, Stein v. City of Winnipeg, *supra* note 68. *See also* Brodie v. City of Halifax, 9 N.S.R. (2d) 390, 46 D.L.R. (3d) 528 (S.C. Chambers 1974), *rev'd* 9 N.S.R. (2d) 380, 47 D.L.R. (3d) 454 (C.A. 1974), where the court held that the discretion to grant standing is to be determined without looking at the matter of laches.

[102] *McNeil*, *supra* note 99, at 267-68, 55 D.L.R. (3d) at 633-34.

[103] *E.g.*, Canadian Broadcasting League v. C.R.T.C. (No. 2), [1980] 1 F.C. 396, 8 C.E.L.R. 173 (App. D. 1979); *Re* British Columbia Wildlife Fed'n and Nu-West Dev. Corp., 6 C.E.L.N. 26 (abr.), 72 D.L.R. (3d) 581 (B.C.S.C. 1976); Jamieson v. Carota, [1977] 2 F.C. 239, 6 C.E.L.N. 31 (App. D.); *Re* S.E.A.P. and Atomic Energy Control Bd., 6 C.E.L.N. 36, 74 D.L.R. (3d) 541 (F.C. App. D. 1977).

A review of the recent cases and the kinds of situtations in which standing might be important in the environmental context would unnecessarily lengthen this survey. However, two situations are worthy of comment.

First, decisions are increasingly being made after hearings by regulatory boards and tribunals. The statutes establishing these boards rarely provide any right of standing other than to the applicant for a licence, government agencies, and persons with a financial or property interest in the subject-matter of the hearings. The statute usually gives the board discretion to grant any other person party status, with no guidance as to how to decide this. In recent years, most boards have taken a liberal approach, recognizing almost everyone who asks to be a party. This may lull some lawyers and community groups into a false sense of security. Applicants are developing a tendency to argue against grants of standing at the outset of hearings. Boards know that community groups and concerned individuals who are granted standing at public hearings may claim a further entitlement to standing in subsequent political, administrative, and judicial review proceedings arising out of the hearings. Under these pressures, and in the absence of any policy pronouncement by Parliament and the provincial Legislatures, there is a risk that boards, for expediency, may become more restrictive in recognizing parties.

Secondly, lawyers and community groups often assume that recognition of their standing at public hearings automatically entitles them to standing in subsequent proceedings. This is far from certain, especially when the original grant of standing may have been discretionary and may not have been subject to any objections or discussion during the hearings. Recent cases appear to treat standing at subsequent proceedings as a matter to be considered in the circumstances and on the merits of each case, and in light of the relevant statutory provisions governing the particular board or the proceedings arising out of the board's hearings.[104] It may be arguable, however, that a grant of standing at public hearings creates at least a *prima facie* right or a presumption of standing at subsequent proceedings, or shifts the onus to the person challenging the intervenor's *locus standi*.

The need for reform of the present restrictive and ambiguous standing rules has been widely recognized. Quebec, in 1978, became the first province to provide for a statutory right to standing in environmental cases. Amendments to its Environment Quality Act provide that any natural person, domiciled in Quebec and frequenting the immediate vicinity of a place where a contravention of the Act is alleged, has

---

[104] *See, e.g.*, Turner v. Secretary of State for the Environment, 28 P. & C.R. 123, at 139 (Q.B. 1973); Canadian Broadcasting League v. C.R.T.C. (No. 2), *supra* note 103; *Re* Royal Comm'n on Conduct of Waste Mgt. Inc., *supra* note 18; Capital Cities Communications Inc. v. C.R.T.C., [1978]2 S.C.R. 141, 81 D.L.R. (3d) 609 (1977).

standing to apply for an injunction.[105] The Ontario Law Reform Commission began a study of standing in 1977. The British Columbia Law Reform Commission has released a discussion paper recommending relaxation of standing requirements in public nuisance and other public interest cases.[106]

F. *Accountability of Government Agencies*

Closely related to standing is the troublesome problem of how to make various kinds of government departments and administrative agencies more accountable to the public, without eroding the principle of legislative sovereignty which recognizes that most decisions have a political component and that in a democratic society the elected representatives of the people must have the last word on most matters. The Canadian Environmental Law Association and other commentators have recommended that legislative sovereignty should be reinforced by safeguards to ensure that, while the legislative and executive arms of government continue to make final decisions, they do so after considering a variety of viewpoints and relevant information and they should be forced to treat their constituents fairly. The kinds of safeguards suggested by CELA include the repeal of privative clauses and wider judicial review of government actions. Greater executive responsibility for the activities and decisions of subordinate agencies might also be accomplished by the government promulgation of policies to guide the decisions made by these agencies and by the establishment of "watchdog" and advisory bodies such as ombudsmen and environmental councils. A third suggestion is that Canadian Governments change their pattern of legislating through skeletal statutes which confer broad discretion and great power on government agencies, in favour of legislating statutes that impose clear duties on these agencies and that contain more detailed and substantive information as to what the legislature intended and what the legislation requires. This change would reduce the number of unlegislated regulations and policies that may be secret, contradictory, or vague.

With regard to such questions of accountability, a few recent developments are worthy of note. The number of judicial review applications in environmental matters is evidence of the public's continuing dissatisfaction with current government decision-making techniques.[107] Some of these cases have resulted in more productive negotiations or more government cooperation with citizens' groups.

---

[105] An Act to Amend the Environment Quality Act, S.Q. 1978, c. 64, s. 19(c).

[106] LAW REFORM COMMISSION OF BRITISH COLUMBIA, CIVIL LITIGATION IN THE PUBLIC INTEREST (1979).

[107] The following are a few of the applications for judicial review of governmental decisions affecting the environment that have been brought over the past five years: *Re* British Columbia Wildlife Fed'n and Nu-West Dev. Corp., *supra* note 103; *Re* S.E.A.P. and Atomic Energy Control Bd., *supra* note 103; *Re* Royal Comm'n on Conduct of Waste Mgt. Inc., *supra* note 18; Rosenberg v. Grand River Conservation Auth., *supra*

Many of them, however, have only succeeded in reconfirming the discretionary nature of administrative decisions and the lack of government accountability.[108]

A major accomplishment of recent judicial review applications, however, has been to strengthen the doctrine that administrative decisions which are not subject to the rules of natural justice must still be made fairly.[109] Even though the cases involving this "fairness" doctrine did not arise out of environmental concerns, they are likely to have an effect on environmental decision-making techniques.

Furthermore, there has been tremendous acceptance of the ombudsman concept throughout Canada over the past five years. Every Canadian province, but one, now has an ombudsman,[110] and many of the complaints handled concern environmental protection. Ontario's ombudsman, for example, has a Land Use Directorate, whose activities often involve investigation of pollution and other forms of environmental degradation. The federal government has considered appointing a general ombudsman, as well as a number of specialized ombudsmen in areas such as human rights and access to government information. A federal railway ombudsman was appointed early in 1979,[111] and the first case referred to her was an environmental one — a complaint about anticipated noise from the proposed expansion of CN railway lines in Mississauga, Ontario.[112] Even the CBC's television ombudsman has frequently been asked to investigate environmental complaints: for example, duck

---

note 100; Stein v. City of Winnipeg, *supra* note 68; Easton v. City of Winnipeg, *supra* note 69; Miller v. City of Winnipeg, *supra* note 68; *Re* Nanticoke Ratepayers Ass'n and the Environmental Assessment Bd., 7 C.E.L.N. 8, 83 D.L.R. (3d) 723 (Ont. S.C. Chambers 1978); Grey County Hydro Corridor Comm. v. Minister of Energy, 7 C.E.L.R. 29 (Ont. Div'l Ct. 1977); Earth Sciences Inc. (E.I.S.I. Resources Ltd.) v. Council of Calgary, 5 Alta. L.R. (2d) 124, 7 C.E.L.R. 32 (C.A. 1978); *Re* Tottrup and the Alberta, 4 Alta. L.R. (2d) 302, 79 D.L.R. (3d) 533 (S.C. 1977). A quick glance through the Canadian Environmental Law Reports will lead the reader to many more such cases.

[108] *E.g.*, Rosenberg v. Grand River Conservation Auth., *supra* note 100; *Re* S.E.A.P. and Atomic Energy Control Bd., *supra* note 103; *Re* Pim and Minister of the Environment, 23 O.R. (2d) 45, 94 D.L.R. (3d) 254 (Div'l Ct. 1978).

[109] The leading Canadian case is now Nicholson v. Haldimand-Norfolk Regional Bd. of Comm'rs of Police, 23 N.R. 410, 88 D.L.R. (3d) 671 (S.C.C. 1978). This decision has now been applied in several cases that have ruled that a variety of administrative agencies, including Ministers of the Crown, with no obligation to follow rules of natural justice, have a duty to act fairly. One recent case involving environmental concerns is Islands Protection Soc'y v. The Queen, 9 C.E.L.R. 1 (B.C.S.C. 1979).

[110] Prince Edward Island has no ombudsman. The most recent province to pass legislation is British Columbia with its Ombudsman Act, S.B.C. 1977, c. 58.

The literature on the ombudsman concept in theory and in practice is extensive. The most recent addition is by Ontario's first ombudsman: A. MALONEY, BLUEPRINT FOR THE OFFICE OF THE OMBUDSMAN IN ONTARIO (1979). It contains information about the mandate of ombudsmen throughout the world and a bibliography of literature on the subject of ombudsmen.

[111] Sonja Saumier-Smith, Transport Ombudsman.

[112] *See CELA Represents Anti-noise Group*, 4 C.E.L.A. NEWSLETTER 7 (1979).

hunting in Point Pelee National Park (an anomaly under federal parks policy), and destruction of trees and filling of a body of water adjacent to cottages at Skugog Island in Ontario.

Experience with environmental advisory councils has been mixed. Ontario's appointment of an independent review committee[113] in 1975 to oversee implementation of the Environmental Assessment Act,[114] and the extension of the Committee's mandate in 1978 to receive complaints about exemptions from the Act,[115] has been positive. On the other hand, one council which acted too aggressively had its wings clipped; the Alberta Government abolished its Environment Conservation Authority in 1975 and replaced it with an agency with no power to initiate investigations unless requested by the government.[116]

G. *Class Actions*

The Canadian Environmental Law Association has suggested that an environmental bill of rights would allow class actions. In effect, any citizen would be able to sue for damages resulting from environmental destruction on behalf of other similarly aggrieved citizens. At present, it is unlikely that class actions are permissable in nuisance suits,[117] which comprise most actions for damages arising out of environmental harm under the rules of civil procedure in all provinces except Quebec.

Quebec has recently passed an Act Respecting the Class Action to incorporate a procedure for collective action in its Code of Civil Procedure, and to set up a Class Action Assistance Fund to assist in financing such actions.[118] This Act appears to liberalize the traditionally narrow interest of virtually identical injury that must be shown in the common law provinces. The court may authorize the bringing of a class action and grant the applicant the status of representative of the class if the court is of the opinion that the recourses of the members raise identical, similar, or related questions of law or fact; the facts alleged seem to justify the conclusions sought; the composition of the group

---

[113] Environmental Assessment Act Steering Committee, Dr. D.A. Chant, Chairman. For further information, *see* ESTRIN & SWAIGEN, *supra* note 6, at 46-47.

[114] S.O. 1975, c. 69.

[115] *See supra* note 52.

[116] Although most provinces and the federal government make provision for some form of advisory council for environmental issues, the Alberta Environment Conservation Authority is the only such body, to the author's knowledge, to have openly taken on an "ombudsman"-like role of activities that might be seen to be publicly critical of the government. Details of the Authority's activities and its demise are found in Elder, *The Participatory Environment in Alberta*, in ENVIRONMENTAL MANAGEMENT AND PUBLIC PARTICIPATION, *supra* note 45, at 101, and Hunt, *Environmental Protection and the Public in the 1970's*, in ALTERNATIVES, winter 1978, vol. 8, at 37.

[117] Preston v. Hilton, 48 O.L.R. 172, 19 O.W.N. 7 (H.C. 1920); Turtle v. City of Toronto, 56 O.L.R. 252, 25 O.W.N. 689 (C.A. 1924).

[118] S.Q. 1978, c. 8. The legislation is described in Longtin, *The Quebec Law Respecting the Class Action*, Appendix H, Schedule, Class Action Committee, UNIFORM LAW CONFERENCE OF CANADA 113 (1978).

makes collective action under normal joinder rules difficult or impracticable; and the member of the class seeking to bring the action is in a position to represent the members adequately.[119] Despite the apparent promise of this Act, the courts have tended to restrict its application in the first few attempts made to launch a class action.[120]

The Ontario Law Reform Commission has been studying class actions since 1977 and it does not expect to issue its final report for another two years. In the meantime, if a 1978 decision of the Ontario Court of Appeal is upheld by the Supreme Court of Canada, a method of maintaining class actions in a form that meets the restrictive criteria of the present class action rules may be established. In *Naken v. General Motors of Canada Ltd.*,[121] four owners alleged that their Firenza motor vehicles were defective and sued General Motors of Canada Ltd. on behalf of everyone who purchased a new 1971 or 1972 Firenza. The Court of Appeal held that the use of a class action was not improper merely because the plaintiffs sought damages or because all members of the class had not been identified in advance. The court held that the proper members of the class could be ascertained following judgement by the use of a reference. No discoveries as to damages were considered necessary since the claim for the diminution in resale value of each Firenza in relation to other vehicles of comparable age, size, and purchase price gave each member of the class equivalent damages.

H. *Burden of Proof*

Perhaps the thorniest question in environmental regulation is how to prove causation. Companies state self-righteously that it is immoral for government to impose the financial burdens of environmental protection on them without clear proof that such measures are warranted or will be successful in reducing environmental harm. However, it is often impossible to prove scientifically a causal link between a specific emission (or series of emissions) of a chemical and some specific harm to the environment or human health. The impact of the pollution may occur decades later or thousands of miles away from the original emission. The difficulties in proving causation include lack of knowledge of the synergistic effects of the combination of substances which are individually harmless, the fact that different contaminants create similar symptoms, and the lack of measuring devices to detect small concentrations of a contaminant. One is also hindered by the crudity of existing scientific methodologies, differences in opinion among experts, and the problem of determining which of several potential sources of pollution

---

[119] S. 1003.

[120] *See* Reid, *La loi sur le recours collectif: premières interprétations judiciaires*, 39 R. DE B. 1018 (1979).

[121] Naken v. General Motors of Canada Ltd., 21 O.R. (2d) 780, 92 D.L.R. (3d) 100 (C.A. 1979). *See also* Prudential Assurance Co. v. Newman Indus. Ltd., [1979] 3 All E.R. 507 (Ch.).

within the area actually did the damage. The net effect of these difficulties is that it is very hard to prove who the polluter is and whether the damage was caused by pollutants or natural causes.

It is even more difficult to prove future harm.[122] At best, the prediction that specific contaminants will have negative effects on human health or the natural environment in the future is based on scientific speculation. Therefore, environmentalists have suggested that the onus should be on anyone who wants to introduce any new product, substance, machine, or process into the marketplace to show that it will not be harmful. Similarly, it has been suggested that in a civil suit or prosecution involving harm that has already occurred or is anticipated, the burden of proof should shift to the defendant or accused if a plaintiff or prosecutor shows that there are probable grounds to support his case.[123] Moreover, if the plaintiff or prosecutor can show that the defendant is engaging in an activity that presents a reasonable risk of harm, there should be a rebuttable presumption that a danger exists that warrants the court granting relief.

Such reverse onus clauses and relaxation of proof requirements are common in legislation involving public health and safety, but they raise issues of interference with civil liberties and the presumption of innocence. So far, they have not generally been extended to environmental legislation, although Ontario's Environmental Protection Amendment Act, 1979[124] has been described as establishing a reverse onus on anyone who owns or controls a pollutant that is accidentally discharged to prove he is not responsible for compensating victims of the spill.[125]

Other recent attempts to relax causation or evidentiary requirements with respect to liability for cleaning up spills and compensating victims include the Manitoba Fishermen's Assistance and Polluters' Liability Act,[126] the Nuclear Liability Act,[127] Part XX of the Canada Shipping Act,[128] 1977 amendments to the Fisheries Act,[129] and the Arctic Waters

---

[122] For a discussion of the problems of proving future harm, *see* Thompson, *A Proposal for an Anticipatory, Preventive System*, in ASK THE PEOPLE (C.G. Morley ed. 1973).

[123] The seminal article on burdens of proof in proceedings to protect human health and environmental amenities is Krier, *Environmental Litigation and the Burden of Proof*, in LAW AND THE ENVIRONMENT 105 (M.F. Baldwin & J.K. Page eds. 1970). *See also* Hanks & Hanks, *supra* note 37, at 265-68, and J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 136-57 (1971).

[124] S.O. 1979, c. 91 (assented to Dec. 20, 1979; not yet in force).

[125] *E.g.*, LEG. ONT. DEB. (unrevised), 31st Leg., 3d Sess. Transcripts of the Standing Resources Development Committee hearings on The Environment Protection Amendment Act, 1979, Bill 24, *per* Environment Minister H.C. Parrott at R-2025-1 and R-2050-1; *per* Murrary Gaunt, M.P.P. at R-2050-1. *But see* submissions of J. Swaigen at R-2130-1. References to The Environmental Protection Amendment Act, 1979, S.O. 1979, c. 91 (not yet in force).

[126] S.M. 1970, c. 32.

[127] R.S.C. 1970 (1st Supp.), c. 29, ss. 4, 6 (in force Oct. 11, 1979).

[128] R.S.C. 1970, c. S-9, ss. 734-751.

[129] R.S.C. 1970, c. F-14, s. 33, *as amended by* S.C. 1976-77, c. 35, s. 10(2)

Pollution Prevention Act.[130] Most of these statutes do not deal directly with causation or onus of proof, but instead abolish defences that would be available at common law or impose strict or absolute liability without proof of fault or negligence.

I. *The Right to Defend the Environment at a Reasonable Cost*

Finally, environmentalists have pointed out that it is not effective to create rights or provide access to decision-makers unless the public can afford to enforce the rights. Such enforcement consists of hiring lawyers and technical experts to help interpret the scientific studies of government and industry consultants, to prepare cases, and to appear before environmental tribunals.[131] The most serious disincentive to private enforcement of rights is the party and party costs likely to be awarded against an unsuccessful plaintiff in a civil action. However, the lack of funding available to intervenors at public hearings of regulatory agencies also discourages public participation and causes the contribution of participants to be much less helpful to the board and less effective than it would be if they could match the legal and scientific expertise available to the proponents of projects.

Several recent developments show promise of greater public access to resources in the future. First, of course, are the *ad hoc* inquiries, which, unlike permanent boards and tribunals, have established a tradition of providing public funding. Intervenors before the Berger, Porter, Hartt, Thompson, and Cluff Lake Inquiries all received funding, either directly through the Commission or indirectly through government. The Alberta Government has made regulations which enable the Energy Resources Conservation Board (ERCB) to reimburse intervenors for some or all of their costs of participating in its hearings,[132] although this is at the Board's discretion and after-the-fact. In one case, the ERCB appointed a lawyer to represent intervenors at its hearing.[133]

---

[130] R.S.C. 1970 (1st Supp.), c. 2, ss. 6, 7 and Arctic Waters Prevention Regulation, S.O.R./72-253 (106 Can. Gazette, Pt. II, 1033).

[131] *See, e.g.*, Estrin, *Something is mything in the public hearing*, in CANADIAN LAWYER, Dec. 1977, at 10, col. 1; The Toronto Star, Jan. 9, 1978, at A10, col. 1. Industry, however, has a different perception of the resources available to environmental groups. A recent statement by R.E. Hallbauer, Vice-President of Teck Corporation of Vancouver, illustrates a prevalent industry view. Saying that the mining industry doing a good job of meeting environmental concerns, Mr. Hallbauer is quoted as saying, "We have a good story to tell, but our opponents are extremely well-organized, well-financed and are eagerly supported by the media": The Globe and Mail (Toronto), Apr. 22, 1980, at B2, col. 1.

[132] The Energy Resources Conservation Amendment Act, 1978, S.A. 1978, c. 57, s. 30.1 (in force Nov. 3, 1978). Local Interveners Costs Regulation, Alta. Reg. 435/78. The operation of this amendment and public response to opinion of its inefficacy are described in L. Duncan, Resources to Public Intervenors: The Environmental Review Process, Alberta, June, 1979 (unpublished study prepared for Alberta Department of the Environment).

[133] The lawyer was James Hope-Ross. The success of this experiment is discussed in Duncan, *supra* note 132.

The Ontario Energy Board recently awarded costs to intervenors who "actively participated and put forward intelligent, well-informed and effective interventions", on the basis that "[i]t is important to encourage active, informed and useful participation . . . so that a wide range of views can be examined".[134] The Quebec Government also recently decided, as mentioned above, to fund class actions. In addition it will fund "counter-information",[135] which is to say that when the government proposes to construct a project that may be controversial, such as a nuclear power plant, it will give opponents of the project funds to tell their side of the story.

The Ontario Government has refused requests to fund intervenors before its environmental boards, but has helped them indirectly. Since 1976, the Ontario Legal Aid Plan has given grants to community legal clinics, such as the one operated by the Canadian Environmental Law Association, to do advocacy work before courts and tribunals.[136] CELA provides free legal services to individuals and groups who could not otherwise afford a lawyer. Ironically, although the Ontario Government has refused requests for funding of interventions to oppose project applications on the grounds that it could not accede to individual requests for assistance without first establishing an overall provincial policy on public funding,[137] it recently agreed to indemnify the purchaser of a company, being sued for losses from mercury pollution, against any award by the courts of damages in excess of fifteen million dollars.[138] The Ontario Government also offered to reimburse a large multi-national corporation for up to 100,000 dollars of its costs of applying for a licence to operate a waste disposal site and solidification plant, if its proposal is rejected by the Environmental Assessment Board.[139] In effect, the Ontario Government has indemnified applicants but refused to fund intervenors.

Apart from these concrete changes in government policies and practices, several recent proposals and recommendations for public

---

[134] *Reference re* Principles of Power Costing and Rate Making Appropriate For Use by Ontario Hydro, 6 C.E.L.N. 171 (Ont. Energy Bd. 1977) (abr.).

[135] ENVIRONMENTAL PROTECTION SERVICE (Government of Quebec), PROGRAMME DE CONTRE-PUBLICITÉ (undated).

[136] The Legal Aid Act, R.S.O. 1970, c. 239, O. Reg. 160/76, *replaced by* O. Reg. 391/79, which largely implemented the recommendations of the REPORT OF THE COMMISSION ON CLINICAL FUNDING (Grange J. Commissioner 1978).

[137] Letter from George A. Kerr, Ontario Minister of the Environment, to John Swaigen, July 25, 1977.

[138] Reed Int'l Ltd. was sued in 1977 by Indians on two reserves who lost their livelihood as a result of contamination of the fishery by mercury. Great Lakes Forest Products Ltd. announced an agreement to purchase the assets of Reed's chlor-alkali plant and pulp and paper mill at Dryden on Nov. 6, 1979. Frank Miller, Treasurer of Ontario, made a statement to the Legislature the same day and released a letter to the President of Great Lakes indicating that the government would indemnify Great Lakes for damages over $15 million provided that Great Lakes modernizes and expands the Dryden facilities. LEG. ONT. DEB., 31st Leg., 3d Sess., No. 102, at 4243-44, 4254 (1979).

[139] *Of Christians v. Lions?*, 5 C.E.L.A. NEWSLETTER 13 (1980).

funding or relief from party and party costs have been made by CELA,[140] a task force on legal aid,[141] an Environmental Assessment Review Process panel,[142] and consultants to the Alberta Department of the Environment[143] and to Ontario's Environmental Assessment Board.[144]

IV. Other Recent Developments: An Environmental Issues Perspective

As mentioned above, a different approach to discussing environmental law is to categorize laws and cases according to the contaminants or activities they regulate, or the resources they are designed to manage. This is a traditional approach used in many texts on environmental law, but it yields a patchwork quilt of legislation because the subject-matter may be affected by a multitude of statutes and policies. This approach, however, makes it possible to focus on many developments that receive little or fragmented attention with the approach used earlier. The following discussion touches upon some of the most dramatic recent developments affecting specific environmental elements and concerns.[145]

A. *Air*

Since the beginning of 1975 there have been numerous objectives, standards, and guidelines for air quality proposed or promulgated under the federal Clean Air Act.[146] They include objectives for tolerable levels of sulphur dioxide, dust, carbon monoxide, oxidants, and nitrogen dioxide;[147] emission guidelines for the asphalt paving, metallurgical

---

[140] J. Swaigen, Costs, Undertakings and Public Interest Cases, July 1978 (a brief to the Civil Procedure Revision Committee, prepared on behalf of the Canadian Environmental Law Research Foundation).

[141] Report of the Task Force on Legal Aid, Part I, 99 (Osler J. Chairman 1974).

[142] Report of the Environmental Assessment Panel on the Port Granby Uranium Refinery Proposal, Eldorado Nuclear Ltd., 42-43 (J.S. Klenavic Chairman 1978).

[143] Duncan, *supra* note 132.

[144] K. Maurer, Public Participation Program Proposals (1978) (Report to members and staff of the Environmental Assessment Board).

[145] This survey is far from complete. More information can be found in publications such as Canadian Environmental Law, Environment on Trial, Environmental Law: A Study of Legislation Affecting the Environment of British Columbia, and Land Use Law: A Study of Legislation Governing Land Use in British Columbia, *supra* note 6. *See also* A Digest of Environmental Protection Legislation in Canada (6th ed. 2 vols. 1977) and the Canadian Environmental Law Reports (C.E.L.R.).

[146] S.C. 1970-71-72, c. 47.

[147] Ambient Air Quality Objectives, No. 3, S.O.R./78-74 (112 Can. Gazette, Pt. II, 467).

coke, and arctic mining industries:[148] and national emission standards for secondary lead smelters,[149] the asbestos mining and milling industry,[150] mercury cell chlor-alkali plants,[151] arsenic emissions from gold-roasting plants,[152] and vinyl chloride and polyvinyl chloride plants.[153] The Act has also been used to limit the amount of lead in "leaded" and "un-leaded" or "lead-free" gasoline.[154] The leaded gas regulations were made in 1974, but did not come into effect until 1976. The Act authorizes the Minister to order works or businesses which he believes to be polluting the air to provide him with data on emissions.[155] Regulations have been made which establish procedures for supplying information about fuels, arsenic, and mercury.[156]

Prevention of air pollution was sometimes subordinated to other social goals during this period. In 1976, Manitoba passed legislation to give businesses creating odours immunity from civil suits, provided that they operate in compliance with permits issued by government authorities.[157] Under 1979 emergency petroleum rationing legislation, the federal government authorized an Energy Supplies Allocation Board to work with the provincial governments to relax laws controlling the discharge of sulphur compounds where this will help to conserve available supplies of scarce fuels such as oil.[158]

B. *Noise*

Between 1975 and 1980 a number of major Canadian municipalities strengthened and enforced their anti-noise by-laws which had been faring

---

[148] Asphalt Paving Indus. Nat'l Emission Guidelines, 109 Canada Gazette, Part I, at 1284 (1975); Metallurgical Coke Mfg. Indus. Nat'l Emission Guidelines, 109 Canada Gazette, Part I, at 2219 (1975); Arctic Mining Indus. Emission Guidelines, 110 Canada Gazette, Part I, at 3564 (1976). These are compiled in Environment Canada Report EPS 1-AP-78-Z (Air Pollution Control Directorate 1978).

[149] Secondary Lead Smelter Nat'l Emission Standards Regulations, S.O.R./76-464 (110 Can. Gazette, Pt. II, 2112).

[150] Asbestos Mining and Milling Nat'l Emission Standards Regulations, S.O.R./77-514 (111 Can. Gazette, Pt. II, 2859).

[151] Chlor-Alkali Mercury Nat'l Emission Standards Regulations, S.O.R./77-548 (111 Can. Gazette, Pt. II, 2985).

[152] As of May, 1980 the final standards had not been promulgated. Environment Canada has published two studies: SOLID-ECONOMIC IMPACT ANALYSIS OF PROPOSED FEDERAL REGULATION ON ARSENIC FROM GOLD ROASTING (1979) and ARSENIC EMISSIONS AND CONTROL TECHNOLOGY: GOLD ROASTING OPERATIONS (1979) (Report EPS 3-AP-79-5).

[153] Vinyl Chloride Nat'l Emission Standards Regulations, S.O.R./79-299 (113 Can. Gazette, Pt. II, 1317). *See* 3 C.E.L.A. NEWSLETTER 88 (1978).

[154] Leaded Gasoline Regulations, S.O.R./74-459 (Can. Gazette, Pt. II, 2268); Lead-Free Gasoline Regulations, S.O.R./73-663 (107 Can. Gazette, Pt. II, 2703).

[155] Clean Air Act, S.C. 1970-71-72, c. 47, s. 6.

[156] Fuels Information Regulations, No. 1, S.O.R./77-597 (111 Can. Gazette, Pt. II, 3320); Metallurgical Indus. Arsenic Information Regulations, S.O.R./77-265 (111 Can. Gazette, Pt. II, 3320); Metallurgical Indus. Mercury Information Regulations, S.O.R./77-266 (111 Can. Gazette, Pt. II, 1666).

[157] The Nuisance Act, S.M. 1976, c. 53.

[158] Energy Supplies Emergency Act, 1979, S.C. 1979, c. 17, s. 24.

very poorly in the courts. However, some of the municipalities required special provincial enabling legislation to give them sufficient power to pass by-laws that would be effective. In 1969, Ottawa was one of the first municipalities to pass a by-law including decibel levels,[159] but because enabling legislation and amendments were needed to improve the by-law, there were delays in enforcing it. In 1975, using a noise expert from the National Research Council as its main witness, the city launched a successful test case against the operator of a tractor-trailer emitting ninety-five decibels of noise.[160] The City of Toronto also passed an anti-noise by-law in 1975.[161] It establishes decibel levels for certain kinds of machinery, but other kinds of noises are also deemed to be disturbing and unlawful without the need for measurements using decibel meters. The city has reported a high degree of success in obtaining convictions.[162]

Provincial governments were also active. Section 169(3), an amendment to Manitoba's Highway Traffic Act, prohibited drivers from causing loud and unnecessary noise by rapid starts, high speed turns, sudden stops, or acceleration of the motor while a vehicle is stationary.[163] The Ontario Ministry of the Environment began imposing "control orders" on factories, requiring them, under the authority of the Environmental Protection Act, to lower noise levels.[164] The Ministry also drafted a model noise by-law for use by municipalities in the province.[165] In 1974, the Alberta Minister of the Environment asked the Environment Conservation Authority to examine the province's noise control legislation and make recommendations. A two-volume report was published in 1979.[166]

Restrictions on noise received at least one potential setback. The federal Lord's Day Act[167] appears to be useful for limiting noise on Sunday by prohibiting many commercial activities. However, in

---

[159] City of Ottawa By-law 163-69 Prohibiting Noise in the Operation of Motor Vehicles on the Streets and Public Ways (1969); City of Ottawa By-law 45-70 For Prohibiting the Making of Disturbing and Objectionable Noises (1970).

[160] R. v. Barlow, 5 C.E.L.N. 59 (Prov. Ct. 1975) (abr.).

[161] City of Toronto By-law 44-75 Respecting Noises (1975), *as amended by* By-law 65-75 and By-law 444-76.

[162] *New Toronto Noise By-law Passes Crucial Test*, 1 C.E.L.A. NEWSLETTER 6 (1976).

[163] Highway Traffic Act, R.S.M. 1970, c. H60, *as amended by* S.M. 1971, c. 71, s. 97 (in force Feb. 18, 1976).

[164] S.O. 1971, c. 86. The first two orders were issued early in 1975, one against an office building in Toronto, and one against Kelson Spring Products Ltd. in Toronto. *See Noisy Factory to Move From Residential Neighbourhood*, 2 C.E.L.A. NEWSLETTER 16 (1977); *CELA Action Leads to Second Ontario Noise Control Order*, 1 C.E.L.A. NEWSLETTER 16 (1976).

[165] ONTARIO MINISTRY OF THE ENVIRONMENT, MODEL MUNICIPAL NOISE CONTROL BY-LAW: FINAL REPORT (1978). For a critical evaluation of the model by-law, *see* ESTRIN & SWAIGEN, *supra* note 6, at 133-36.

[166] NOISE IN THE HUMAN ENVIRONMENT (H.W. Jones ed. 2 vols. 1979).

[167] R.S.C. 1970, c. L-13.

litigation by the City of Hamilton against a trucking company, the Supreme Court of Canada cast doubt on the extent to which at least one section of the Act can be used to protect the public against noise and other forms of pollution.[168]

C. *Water Pollution*

In 1975, Canada passed an Ocean Dumping Control Act,[169] intended to limit the dumping of wastes and other harmful substances in the oceans. The Act prohibits *deliberate* dumping of specified substances by all vessels in Canadian waters, and by Canadian ships wherever located, as well as dumping from aircraft, platforms, and other installations.[170] Under the Act no permits would be issued to dump certain wastes known to cause harm, such as mercury and cadmium, except in very special circumstances.[171] Permits would be issued for other substances which, in the government's opinion, can be safely dumped in the sea using precautions and under supervision. Illegal dumping would be subject to fines up to 100,000 dollars.[172] Regulations issued under the Act govern application procedures for dumping permits, permit fees, maximum concentrations of substances that may be dumped, and filing reports of emergency dumping.[173]

Canada's Fisheries Act was extensively amended in 1977.[174] Under the amendments, anyone responsible for a spill of a substance that may be deleterious to fish has a duty to report the incident and an obligation to take remedial action and compensate for loss or damage. The polluter must clean up spills and take preventive action to avert any serious and imminent danger of a spill. Both the cargo owner and the carrier must do all they can to prevent or mitigate the effects of any spill. Both are responsible (where required by regulations) for notifying officials of the Federal Department of the Environment of any spill, and must comply with orders issued by the Department.[175]

The new section 32(10) imposes civil liability for depositing or permitting the deposit of a deleterious substance in water frequented by fish. Previously, civil liability could attach only to a person who could be convicted of the quasi-criminal offence of causing or permitting the

---

[168] City of Hamilton v. Canadian Transp. Comm'n, 6 C.E.L.N. 167, 80 D.L.R. (3d) 263 (S.C.C. 1977).

[169] S.C. 1974-75, c. 55.

[170] S. 4.

[171] S. 9(5)(6).

[172] S. 13.

[173] Ocean Dumping Control Regulations, S.O.R./75-595 (109 Can. Gazette, Pt. II, 2786).

[174] R.S.C. 1970, c. F-14, *as amended by* S.C. 1976-77, c. 35.

[175] An Act to amend the Fisheries Act and to amend the Criminal Code in consequence thereof, S.C. 1976-77, c. 35, s. 9 (amending R.S.C. 1970 (1st Supp.), c. 17, s. 3(2)).

deposit. The expanded section makes the owner of a pollutant, any person in charge of it, and anyone who caused or contributed to the deposit, jointly and severally liable, without proof of fault or negligence, to reimburse the federal or provincial government for any reasonable costs and expenses incurred in taking corrective or preventive action. They are also liable to compensate licensed commercial fishermen for any loss of income caused by the deposit or by a prohibition on fishing issued by a government agency as a result of the pollution. This statutory liability attempts to come to grips with special problems experienced by fishermen in obtaining compensation at common law: cases have ruled that fishermen have no property rights in fish they have not caught and that loss of income is consequential rather than direct damage.[176] Although these compensation provisions are probably within federal competence with respect to interprovincial pollution, it will be interesting to see whether they apply to damages from pollution within a province. They may be sustainable on the basis of the federal government's jurisdiction over fisheries or they may be held to be within the provinces' jurisdiction over torts.[177]

The 1977 amendments also expanded the offence of polluting fisheries to include contamination of fish habitat[178] and fish eggs,[179] and increased the maximum fine from 5,000 to 100,000 dollars.[180] They enhanced the minister's powers to require a copy of the plans and specifications of any proposed new operation or expansion of existing operations, to order modifications to the work if he believes it will result in disruption or contamination of fish habitat, or to shut down the work with cabinet's approval.[181] Several regulations to control discharges have also been made.[182]

---

[176] Fillion v. New Brunswick Int'l Paper Co., 8 M.P.R. 89, [1934] 3 D.L.R. 22 (N.B.C.A.); Hickey v. Electric Reduction Co. of Canada, 2 Nfld. & P.E.I.R. 246, 21 D.L.R. (3d) 368 (Nfld. S.C. 1971).

[177] *See* discussion of The Queen v. Interprovincial Co-ops. Ltd., 2 C.E.L.N. 47 (abr.), 38 D.L.R. (3d) 367 (Man. C.A. 1973), *rev'd.* [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321 (1975), *infra* p. 485. MacDonald v. Vapour Canada Ltd., 7 N.R. 477, 66 D.L.R. (3d) 1 (S.C.C. 1976); and R. v. Zelensky, [1977] 1 W.W.R. 155, 73 D.L.R. (3d) 596 (Man. C.A. 1976), *rev'd in part* [1978] 2 S.C.R. 940, 86 D.L.R. (3d) 179 raise the question of when, if ever, federal legislation which purports to create a civil remedy can be valid.

[178] An Act to amend the Fisheries Act and to amend the Criminal Code in consequence thereof, S.C. 1976-77, c. 35, s. 5 (replacing R.S.C. 1970, c. F-14, s. 30).

[179] S. 1 (amending R.S.C. 1970, c. F-14, s. 2).

[180] S. 7 (amending R.S.C. 1970 (1st Supp.) c. 17, s. 3(2)).

[181] S. 8 (amending R.S.C. 1970 (1st Supp.) c. 17, s. 3(2)).

[182] *E.g.*, Chlor-Alkali Mercury Liquid Effluent Regulations, S.O.R./77-575 (111 Can. Gazette, Pt. II, 3074); Meat and Poultry Prods. Plant Liquid Effluent Regulations, S.O.R./77-279 (111 Can. Gazette, Pt. II, 1695); Metal Mining Liquid Effluent Regulations, S.O.R./77-178 (111 Can. Gazette, Pt. II, 667); and Potato Processing Plant Liquid Effluent Regulations, S.O.R./77-518 (111 Can. Gazette, Pt. II, 2875) were made in the period 1975-1980. In addition, special regulations were made governing individual sources of pollution such as the Alice Arm Tailing Deposit Regulations, S.O.R./79-345 (113 Can. Gazette, Pt. II, 1543). Important regulations made before

After 1975, the attention of regulatory agencies shifted to some extent from the obvious sources of water pollution — individual factories and sewage treatment plants (''point sources'') — to more insidious forms of pollution such as long-range transport of air pollutants and runoff of contaminants from farms, roads, and contruction sites (''non-point sources'').

Acid precipitation, which threatens fish life in thousands of rivers and lakes throughout Canada and the United States, was recognized as an interprovincial and international problem. Studies indicated that air emissions from nickel smelters in Sudbury, Ontario were entering water bodies in Quebec and the United States, and that emissions from the U.S. steel industry in the Ohio Valley were being transported to Canada.[183] The urgency of the situation led to negotiations between Canada's federal and provincial governments for a federal-provincial agreement to reduce emissions, and between Canada and the United States for an international air pollution treaty.[184]

1975 include the Pulp and Paper Effluent Regulations, S.O.R./71-578 (105 Can. Gazette, Pt. II, 1886) and the Petroleum Refinery Liquid Effluent Regulations, S.O.R./73-670 (107 Can. Gazette, Pt. II, 2720).

[183] LEGISLATURE OF THE PROVINCE OF ONTARIO STANDING COMMITTEE ON RESOURCE DEVELOPMENT, REPORT ON ACIDIC PRECIPITATION, ABATEMENT OF EMISSIONS FROM THE INTERNATIONAL NICKEL COMPANY OPERATIONS AT SUDBURY, AND POLLUTION CONTROL IN THE PULP AND PAPER INDUSTRY (1979), GREAT LAKES SCIENCE ADVISORY BOARD, ANNUAL REPORT (prepared for the International Joint Commission, 1979); CANADA/UNITED STATES RESEARCH CONSULTATION GROUP ON THE LONG-RANGE TRANSPORT OF AIR POLLUTANTS, ANNUAL REPORT (prepared for the Governments of Canada and the United States, 1979).

[184] On Aug. 5, 1980, the U.S. Secretary of State Edmund Muskie and the Canadian Minister of the Environment John Roberts signed a memorandum of intent to curb acid rain and international air pollution problems. The two countries pledged to negotiate a treaty within two years. The Globe and Mail (Toronto), Aug. 6, 1980, at 1, col. 5.

Achieving such a treaty may be facilitated by recent recommendations of the Organization for Economic Co-operation and Development to its members (which include Canada and the United States) and by a draft treaty prepared jointly by the American and Canadian Bar Associations.

The OECD recommended in 1977 that countries whose industries may cause pollution in neighbouring nations should consult with their neighbours and provide them with access to information, try to make their environmental and use policies compatible with those of their neighbours, and ensure that any person in a neighbouring country who may be harmed by trans-boundary pollution has just as great access to the courts of the country where the pollution originates as that country's own citizens would have for redress from pollution within their nation. *See* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL FOR THE IMPLEMENTATION OF A REGIME OF EQUAL RIGHT OF ACCESS AND NON-DISCRIMINATION IN RELATION TO TRANS-FRONTIER POLLUTION (1977).

The CBA and ABA Treaty is an attempt to resolve the problem that citizens of Canada and the United States do not have the same rights of access to each other's courts as each nation's citizens have to their own courts, or if they do, they do not have the same remedies. The Treaty provides that an actual or potential victim of trans-frontier pollution will not be deprived of a remedy in the courts of the polluter's residence if a victim residing in the country of origin would have had a remedy in the case of domestic

Meanwhile, the International Joint Commission, realizing that the Great Lakes continue to be polluted with phosphorous, pesticides, heavy metals, sediments, and industrial organic compounds, despite curtailment of many discharges from specific sources, began to study non-point source pollution from land-use activities.[185]

Water pollution continued to be a fertile source of litigation, resulting in decisions discussing important constitutional issues,[186] principles of sentencing,[187] the provincial agencies' power to order a spiller to clean up, and the scope of the spiller's liability.[188] Another issue raised was whether or not legislation requiring cleanup of spills was retroactive.[189] The increasing concern with which the courts viewed water pollution was reflected in higher fines. In several cases, courts imposed the then maximum fine of 5,000 dollars under the Fisheries Act,[190] and in one case American Can was fined 64,000 dollars[191] on conviction of several counts of depositing mercury in excess of amounts prescribed in the Chlor-Alkali Mercury Liquid Effluent Regulations.[192] One company was fined 49,000 dollars for breaches of the Northern Inland Waters Act.[193]

D. *Pesticides*

It is ironic that, although a book about the dangers of pesticides was one of the major catalysts of the environmental movement,[194] there

---

pollution. *See Draft Treaty on a Regime of Equal Access and Remedy in Cases of Trans-frontier Pollution*, in REPORT AND RECOMMENDATIONS OF THE AMERICAN AND CANADIAN BAR ASSOCIATIONS JOINT WORKING GROUP ON THE SETTLEMENT OF INTERNATIONAL DISPUTES (1979).

[185] *See, e.g.*, INTERNATIONAL JOINT COMMISSION, POLLUTION IN THE GREAT LAKES BASIN FROM LAND USE ACTIVITIES (report to the Governments of the United States and Canada) (1980); INTERNATIONAL REFERENCE GROUP ON GREAT LAKES POLLUTION FROM LAND USE ACTIVITIES, ENVIRONMENTAL MANAGEMENT STRATEGY FOR THE GREAT LAKES SYSTEM (final report to the I.J.C., 1978).

[186] *See* discussion of The Queen v. Interprovincial Co-ops Ltd., *supra* note 177, *infra* p. 485. *See also* R. v. Fowler, 5 C.E.L.N. 115 (abr.), [1976] 6 W.W.R. 28 (B.C. Prov. Ct.), *aff'd* (S.C.C. June 17, 1980), *rev'g* 8 C.E.L.R. 45, [1979] 1 W.W.R. 285 (C.A. 1978), [1977] 4 W.W.R. 449 (Cty. Ct.); Northwest Falling Contractors Ltd. v. The Queen, (S.C.C. July 18, 1980).

[187] R. v. Cyprus-Anvil Mining Corp., 5 C.E.L.N. 116 (Yukon Mag. Ct. 1975), *aff'd* with reduced fine 5 C.E.L.N. 117 (Yukon C.A. 1976).

[188] R. v. Power Tank Lines Ltd., 23 C.C.C. (2d) 464, 5 C.E.L.N. 15 (Ont. Prov. Ct. 1975) (abr.).

[189] Rempel-Trail Transp. Ltd. v. Minister of the Environment, 8 C.E.L.R. 91 (B.C.S.C. 1978).

[190] ESTRIN & SWAIGEN, *supra* note 6, at 148-9.

[191] R. v. American Can of Canada Ltd., (Ont. Prov. Ct. Apr. 4, 1977), discussed in ESTRIN & SWAIGEN, *supra* note 6, at 144, n. 17, 149. *See also*, *Highest Fine Ever Assessed for Environmental Pollution in Canada*, 6 C.E.L.A. NEWSLETTER 40 (1977).

[192] Chlor-Alkali Mercury Liquid Effluent Regulations, S.O.R./77-575 (111 Can. Gazette, Pt. II, 3074).

[193] R. v. Cyprus-Anvil Mining Corp. (Yukon Mag. Ct. Sept. 13, 1976); *see* ESTRIN & SWAIGEN, *supra* note 6, at 149.

[194] R. CARSON, SILENT SPRING (1962).

seemed to be little apparent public concern about the spraying of pesticides in the mid-1970's. Until about 1977, the staff of the Canadian Environmental Law Association was receiving very few complaints about pesticide use. Perhaps government restrictions on the use of some of the most toxic pesticides, such as DDT, created a temporary complacency. However, in the latter part of the decade, public concern about pesticides returned. The spraying of lakes and forests in British Columbia, a government and industry program of spruce budworm control in New Brunswick, the spraying of 2,4-D on northern Ontario forests and southern Ontario schoolyards, an Ontario Ministry of the Environment plan to dispose of 2,4,5-T containing dioxin by spraying it on public land, and spraying to kill mosquitoes in Winnipeg attracted vociferous public opposition, and, in some instances, litigation.

Three recent cases involved the spruce budworm control program of Forest Products Limited (FPL), the New Brunswick Crown corporation responsible for protection of the province's forests against disease. Two of the cases were successful tort actions, one for damages resulting from aerially-sprayed fenitrothion drifting onto a blueberry farm,[195] and another for damages from spray that came in direct contact with a family strolling on their property.[196] The third case[197] was an application by FPL to quash thirty informations and summonses in private prosecutions for alleged breaches of the Fisheries Act[198] and Pest Control Products Act.[199] Other cases were an unsuccessful action for damages to a Manitoba farmer's flax crop from aerial spraying of a herbicide[200] and judicial review of a decision by the British Columbia Pesticides Control Appeal Board to allow the application of herbicides to kill water weeds in lakes.[201]

Perhaps the most significant legislative development during the past five years was British Columbia's repeal in 1977 of the pesticide provisions in its Pharmacy Act[202] and their replacement by the Pesticide Control Act.[203] The new Act sets up a permit and licensing system. No one may carry on a business involving the sale or application of pesticides without first obtaining the appropriate licence[204] or certificate covering his activities.[205] Permits to apply pesticides to public land or water are issued by a government official who must be satisfied that the

---

[195] Bridges Bros. v. Forest Protection Ltd., 5 C.E.L.N. 170 (abr.), 72 D.L.R. (3d) 335 (N.B.Q.B. 1976).

[196] Friesen v. Forest Protection Ltd., 7 C.E.L.R. 124 (abr.), 22 N.B.R. (2d) 146 (N.B.Q.B. 1978).

[197] *Re* Forest Protection Ltd. and Guerin, 7 C.E.L.R. 93 (N.B.Q.B. 1978).

[198] R.S.C. 1970, c. F-14.

[199] R.S.C. 1970, c. P-10 (in force Nov. 25, 1972).

[200] Cruise v. Niessen, 6 C.E.L.N. 177 (abr.), 76 D.L.R. (3d) 343 (Man. Q.B. 1977), *rev'd* 6 C.E.L.N. 178 (abr.), 82 D.L.R. (3d) 190 (C.A. 1977).

[201] Lewis v. Pesticide Control Appeal Board, 8 C.E.L.R. 1 (B.C.S.C. 1978).

[202] S.B.C. 1974, c. 62, ss. 66-72, (*repealed by* S.B.C. 1977, c. 59, s. 24).

[203] S.B.C. 1977, c. 59 (in force Mar. 9, 1978).

[204] S. 2.

[205] S. 3.

application will not cause any unreasonable adverse effects.[206] Decisions of this administrator may be appealed to a Pesticide Control Appeal Board.[207] Manitoba passed a similar Pesticides and Fertilizers Control Act in 1976.[208]

E. *Nuclear Energy and Radiation*

The expansion of Canada's nuclear energy industry to meet anticipated domestic oil shortages and to improve Canada's balance of payments by exporting nuclear technology and uranium has given rise to a new social protest movement: a loose coalition of anti-nuclear groups of various ideological and social persuasions.[209] The protestors are concerned about occupational and environmental health and safety, the security implications of a highly centralized technology, and nuclear weapons proliferation. Proponents of nuclear power, on the other hand, argue that it is relatively "clean" and safe, and the most feasible way of averting energy shortages at home and helping developing countries to secure a reliable source of energy.

The Nuclear Liability Act was passed in 1970 to ensure compensation of victims of any accident at any Canadian nuclear reactor. It was not proclaimed until 1976 because of the reluctance of private insurers to issue policies covering the full extent of the loss that might be expected from such an accident.[210]

Under the Act, the operator of a nuclear facility has a duty to prevent injury to health or property from nuclear material at his installation or in transit.[211] He is absolutely liable to compensate victims of the breach of that duty,[212] except when the nuclear incident is caused by war, invasion, insurrection, or deliberate damage by a third party (for example, terrorism).[213] To pay compensation costs, the operator must carry up to seventy-five million dollars insurance, provided by private insurers and possibly reinsured by the federal government.[214] The federal cabinet may appoint a Nuclear Damage Claims Commission to handle claims arising out of major disasters.[215]

The federal government has also taken steps to replace the Atomic Energy Control Act[216] with a new regulatory regime. Recognizing that

---

[206] S. 4.
[207] S. 12.
[208] S.M. 1976, c. 19.
[209] Organizations that have expressed opposition to expansion of Canada's nuclear energy program include Energy Probe, the Saskatoon Environmental Society, the Canadian Coalition for Nuclear Responsibility, the Greenpeace Foundation, Voice of Women, the Sierra Club, and the Christian Movement for Peace.
[210] R.S.C. 1970 (1st Supp.), c. 29 (in force Oct. 11, 1976).
[211] S. 3.
[212] S. 4.
[213] Ss. 7, 8.
[214] Ss. 15, 16.
[215] S. 21.
[216] R.S.C. 1970, c. A-19.

"[r]apid growth and increasing complexity of the nuclear industry, both nationally and internationally, have overtaken the existing legislation which was created in the immediate post-war period when interests and priorities were very different",[217] the Federal Minister of Energy, Mines and Resources tabled the Nuclear Control and Administration Act[218] in November, 1977. This Bill was intended to replace the Atomic Energy Control Board with an expanded Nuclear Control Board (NCB). The NCB would perform the following functions: serve as a source of public information on health, safety and environmental matters; hold public hearings before licensing construction of major nuclear facilities; publish notices of all licence applications; make available for public inspection most documents submitted by applicants and licensees; and have increased powers to ensure compliance with its rulings. The Board would administer a decontamination fund built up from payments by licensees, and would be able to order persons responsible for contamination to clean up. Where the person responsible refused, the Board could pay for the cleanup out of the fund and sue to recover its expenses.

The government withdrew this Bill as a result of opposition from provincial governments which claimed that it infringed provincial jurisdiction over administration of public lands and natural resources, occupational health and safety, and environmental protection.[219] Nevertheless, the government has proceeded to implement some of the proposed reforms through existing institutional structures. Early in 1980, for example, the Atomic Energy Control Board (AECB) announced a new public information policy.[220] Since May 1, 1980, previously confidential documentation pertaining to the nuclear licensing process has been accessible to the public at the Ottawa offices of the AECB. The Board also promised to inform the press of any actual or potential hazard that comes to its attention. In February, 1980, the Board announced proposed

---

[217] Alistair Gillespie, *Nuclear Control Act Tabled*, Energy, Mines and Resources Canada News Release (undated).

[218] Bill C-14, 30th Parl., 3d sess., 1977 (1st reading Nov. 24, 1977).

[219] *See* A BRIEF PREPARED BY THE PROVINCE OF SASKATCHEWAN SUMMARIZING COMMENTS AND CONCERNS OF CERTAIN PROVINCES WITH RESPECT TO BILL C-14 (a discussion paper) (undated); A SUMMARY OF PROVINCIAL CONCERNS, PRINCIPLES, AND RECOMMENDATIONS RELATING TO QUESTIONS OF REGULATION AND CONTROL OF URANIUM, THORIUM, NUCLEAR ENERGY AND MATTERS RELATED THERETO — BILL C-14 (1978). These papers were prepared in accordance with an agreement reached at the 35th Annual Conference of the Ministers of Mines, that Saskatchewan would prepare an Interprovincial Position Paper delineating the aspects of Bill C-14 that were acceptable and unacceptable to the provincial governments.

[220] *AECB Announces New Public Information Policy*, AECB News Release (Jan. 31, 1980). Included with this news release were *AECB Policy on Public Access to Licensing Information* (effective May 1, 1980); and *Working Procedures for AECB Policy on Public Access to Licensing Information* (Jan. 21, 1980). *But see* The Globe and Mail (Toronto), May 2, 1980, at 8, col. 6, describing the opposition of the owners of the nuclear power plants to this policy.

regulations to prevent sabotage and theft of nuclear materials, and released them in draft form for public comment.[221]

Atomic energy was also the subject of numerous studies and inquiries between 1975 and 1980, as well as occasional litigation. Besides the Porter, Bates, and Cluff Lake Inquiries mentioned above, several Environmental Assessment Review Process hearings were held.[222] In September, 1974, Dr. James Ham was appointed commissioner of an inquiry into the health and safety of workers in Ontario's mines. His report, issued in 1976, was particularly critical of federal and provincial regulation of uranium mines and suggested drastic reductions in permissable levels of radiation exposure.[223] Although experts generally agree that there is currently no absolutely safe means of disposing of nuclear wastes, a 1977 report commissioned by the Department of Energy, Mines and Resources recommended that the disposal problem need not delay the country's nuclear power program, provided that the government immediately begins research to find a solution. The authors of that report recommended "deep disposal" in rock as the best prospect for the safe, permanent disposal of radioactive wastes.[224]

Recent litigation arising from discontent with Canada's nuclear energy activities includes two unsuccessful challenges of the power of the AECB to refuse to hold public hearings on matters potentially affecting public health and safety,[225] and a challenge to the validity of regulations preventing the release of information about an alleged uranium cartel.[226] Criminal Code charges were laid against British Columbia residents who obstructed a highway while protesting uranium exploration activities and their possible effects on the health of their families and the community.[227]

---

[221] The Globe and Mail (Toronto), Feb. 22, 1980, at 10, col. 4.

[222] *E.g.*, REPORT OF THE ENVIRONMENTAL ASSESSMENT PANEL ON THE PORT GRANBY URANIUM REFINERY PROPOSAL, ELDORADO NUCLEAR LTD. (J.S. Klenavic Chairman 1978); REPORT OF THE ENVIRONMENTAL ASSESSMENT PANEL, ELDORADO URANIUM HEXAFLUORIDE REFINERY, ONTARIO (J.S. Klenavic Chairman 1979). This report discusses the suitability of sites in the Port Hope, Sudbury and Blind River areas for the refinery for which the Port Granby site was rejected. The first EARP hearing was held early in 1975 to review the potential environmental impact of a nuclear reactor at Point Lepreau, New Brunswick. The adequacy of this assessment is discussed in EMOND, *supra* note 6, at 236-51; G.B. DOERN, THE ATOMIC ENERGY CONTROL BOARD: AN EVALUATION OF REGULATORY AND ADMINISTRATIVE PROCESSES AND PROCEDURES (submitted to the Law Reform Commission of Canada, 1977); and Mitchell, *Comment: First Federal 'EARP' Study: Too Little, Too Late*, 4 C.E.L.N. 218 (1975). The complete report of the Point Lepreau panel is reproduced in 4 C.E.L.N. 209 (1975).

[223] REPORT OF THE ROYAL COMMISSION ON THE HEALTH AND SAFETY OF WORKERS IN MINES (J. Ham Commissioner 1976).

[224] A. AIKIN, J. HARRISON & F. HARE, THE MANAGEMENT OF CANADA'S NUCLEAR WASTES, 6 (Energy, Mines and Resources Canada 1977).

[225] *Re* S.E.A.P. and Atomic Energy Control Bd., *supra* note 103; *Re* Croy and the Atomic Energy Control Bd., 9 C.E.L.R. 31 (F.C. App. D. 1979). *See also Re* AGIP S.p.A. and Atomic Energy Control Bd., [1979] 1 F.C. 223, 87 D.L.R. (3d) 530 (App. D. 1978).

[226] *Re* Clark and Attorney-General of Canada, 17 O.R. (2d) 593, 81 D.L.R. (3d) 33 (H.C. 1977).

[227] R. v. McGregor, 8 C.E.L.R. 127 (B.C. Prov. Ct. 1979).

F. *Other Contaminants*

The Environmental Contaminants Act[228] was proclaimed in force April 1, 1976. It is administered jointly by two federal departments: Environment and National Health and Welfare. This Act seeks to protect human health and the environment from substances before they do actual harm, by identifying their dangers before they are widely distributed. It attempts to control such substances at the source: the point of manufacture or importation.

Regulations have been made which limit the use of PCBs[229] and Mirex,[230] and the Department of the Environment has issued guidelines for the disposal of materials containing PCBs.[231] The government has also required anyone engaging in commercial activity involving the use of Mirex, PCTs, and PBBs to notify the Minister of the Environment of that activity.[232] A joint Environment/National Health and Welfare committee has also issued a list of problem substances for which it is considering future restrictions.[233]

In the event that the Environmental Contaminants Act does not succeed in preventing harmful quantities of toxic substances from entering the environment, three provinces have recently amended their environmental protection laws to increase the powers of the provincial Minister of the Environment to clean up contaminated areas and charge the cost to the polluter. Amendments to British Columbia's Pollution Control Act[234] and Quebec's Environment Quality Act[235] authorize the Minister to give orders to remove contaminants from soil, air, and water, and for the government to take this action if orders are not followed and to charge the cost to the person responsible for the contamination. These powers apply only to cases of urgency.

Ontario's Environmental Protection Amendment Act, 1979[236] is similar, but it is broader in some respects and narrower in others. Under this Act, the Minister's cleanup powers are not limited to emergencies, and both the owner and the person in control of a pollutant may be

---

[228] Environmental Contaminants Act, S.C. 1974-75-76, c. 72. R. HALL & D. CHANT, ECOTOXICITY: RESPONSIBILITIES AND OPPORTUNITIES (Canadian Environmental Advisory Council, Report No. 8, 1979) contains a critique of this legislation and its underlying assumptions.

[229] Schedule to the Act, amendment, S.O.R./77-733 (111 Can. Gazette, Pt. II, 4228) and Chlorobiphenyl Regulations No. 1, S.O.R./77-734 (111 Can. Gazette, Pt. II, 4229).

[230] Mirex Regulations, S.O.R./78-891 (112 Can. Gazette, Pt. II, 4276).

[231] ENVIRONMENT CANADA, INTERIM WASTE MANAGEMENT GUIDELINES FOR MATERIALS CONTAINING PCBs (1977).

[232] Notice from the Department of the Environment, 111 Canada Gazette, Part I, at 99 (1977).

[233] S.O.R./77-733, *supra* note 229 and Schedule to the Act, amendment, S.O.R./78-892 (112 Can. Gazette, Pt. II, 4277).

[234] S.B.C. 1967, c. 34, *as amended by* S.B.C. 1977, c. 17, s. 12.

[235] S.Q. 1972, c. 49, *as amended by* S.Q. 1978, c. 64, ss. 40-46.

[236] S.O. 1979, c. 91 (amending S.O. 1971, c. 86) (not yet in force).

ordered not only to remove the contaminant, but also, within reason, to restore the environment to its previous condition.[237] Moreover, the persons responsible have a duty, even in the absence of negligence or fault, to compensate anyone suffering loss or injury unless they can establish that they acted with reasonable care.[238] However, unlike the other amendments, Ontario's provisions are restricted to spills and do not apply to a build-up of pollutants as a result of routine plant discharges or emissions.

Occupational health and safety legislation passed between 1975 and 1980 in several provinces[239] also has great potential to control a wide variety of contaminants in the workplace, by improving the operation of existing regulations and by stimulating development of stricter standards. Typically, the new legislation provides for the appointment by workers of a health and safety representative, the establishment of workplace health and safety committees, and the authorization for employees to refuse to work in hazardous conditions.

G. *Aggregate Extraction*

Gravel pits and sand quarries generate noise, dust, and truck traffic. Excavation and blasting may damage the water table and nearby wells. Abandoned pits and quarries become an eyesore and a safety hazard. Not surprisingly, then, mining of aggregates has led to controversy in recent years, especially in southern Ontario where many pits and quarries are close to residential, agricultural, recreational, and environmentally sensitive areas.

Recent litigation over the establishment or operation of pits and quarries has included actions by aggregate operators to quash municipal by-laws restricting their activities[240] and by neighbours against gravel pit operators.[241] Actions have also been brought by neighbours of pits and quarries seeking to prevent the Minister of Natural Resources from issuing licences,[242] and by ratepayers alleging bad faith on the part of a municipal council in designating land for extractive purposes without allowing adequate notice or public participation.[243]

---

[237] S. 2 (amending S.O. 1971, c. 86, s. 68(*c*)).

[238] S. 2 (amending S.O. 1971, c. 86, s. 68(*i*)).

[239] *E.g.*, The Occupational Health and Safety Act, 1977, S.S. 1976-77, c. 53; The Occupational Health and Safety Act, 1978, S.O. 1978, c. 83; The Workplace Safety and Health Act, S.M. 1976, c. 63.

[240] Township of Uxbridge v. Timber Bros. Sand and Gravel, 7 O.R. (2d) 484, 55 D.L.R. (3d) 516 (C.A. 1975). For a comment on this case, see Estrin, *Control Over Pits and Quarries in Ontario*, 4 C.E.L.N. 232 (1975).

[241] Walker v. Pioneer Constr. Co. (1967), 8 O.R. (2d) 35, 56 D.L.R. (3d) 677 (H.C. 1975); Muirhead v. Timber Bros. Sand and Gravel (Ont. H.C. July 29, 1977).

[242] Millar v. Minister of Natural Resources, 7 C.E.L.N. 156 (Ont. Div'l Ct. 1978) (abr.); *Re* Harris Fisheries Ltd. and Pelee Quarries Inc., 20 O.R. (2d) 96 (Div'l Ct. 1978).

[243] *Re* Starr and Township of Puslinch (No. 2), 16 O.R. (2d) 316, 2 M.P.L.R. 208 (Div'l Ct. 1977), *aff'd* 20 O.R. (2d) 313 (C.A. 1978).

In June of 1979, the Ontario Minister of Natural Resources introduced the proposed Aggregates Act[244] to cure what he perceived to be the defects in the present legislative regime. This controversial Bill has raised the ire of municipalities, ratepayer groups, environmentalists, and sand and gravel operators. As of July, 1980, the Bill still has not been passed.

H. *Forestry*

The predominant concern in regard to forest management has been that Canada is running out of commercially valuable trees as a result of the failure to regenerate cut-over forests.[245] Although timber is a self-renewing resource, natural regeneration does not occur fast enough to offset the effects of logging, fire, insects, harsh weather, destruction of forests by Alberta's oil and gas industry, and removal of commercially viable forests from production by rezoning for recreation and conservation. The logging industry, whose market is cyclical, claims it cannot afford to restock forests unless it is guaranteed long-term contracts to cut. At the same time, government is reluctant to grant long-term leases without requiring much higher expenditures by the industry on reforestation. Meanwhile, loggers are unable to provide mills with a steady supply of quality timber and have begun to apply for licences to cut remote, marginally economic, slow-to-regenerate stands. To prevent the stock of timber from declining further, governments are continuing controversial and possibly dangerous pesticide spraying programs.

In an effort to solve these problems, at least two provinces have recently made substantial amendments to their forestry legislation. A third has announced plans to pass new legislation. British Columbia replaced its Forest Act with a new statute of the same name in 1978.[246] The new legislation is intended to provide incentives for private companies to reforest the public land they have harvested.[247] In 1979,

---

[244] Bill 127, 31st Leg. Ont., 3d sess., 1979 (1st reading June 14, 1979). It was re-introduced as The Aggregates Act, 1980, Bill 127, 31st Leg. Ont., 4th sess., 1980 (1st reading Mar. 11, 1980; 2d reading Mar. 13, 1980). For a discussion of the background to this Bill and a critique, see J. SWAIGEN & J. CASTRILLI, THE PROPOSED ONTARIO AGGREGATES ACT: DISCUSSION, EVALUATION AND RECOMMENDATIONS (1978).

[245] An interesting recent article about this problem is Morton, *The Reforestation Time Bomb*, in CANADIAN BUSINESS, January 1980, at 53. *See also* F.L.C. REED & ASSOCIATES LTD., FOREST MANAGEMENT IN CANADA (prepared for the Forest Management Institute, Environment Canada, 1978) (2 vols.).

[246] S.B.C. 1978, c. 23. The Act is based on the ROYAL COMMISSION ON FOREST RESOURCES, TIMBER RIGHTS AND FOREST POLICY IN BRITISH COLUMBIA (Dr. P. Pearse Commissioner 1976).

[247] S. 45 provides that a person who harvests Crown timber under an agreement with the provincial government must reforest the area in the manner provided for in the agreement or in accordance with regulations, if there is no provision in the agreement, unless the regional manager exempts him. S. 25 authorizes the regional manager to impose reforestation requirements in a timber license. S. 88 and Regulation 55-78 allow

Ontario also passed amendments to its Crown Timber Act,[248] intended to stimulate private reforestation programs.[249] New Brunswick has announced legislation providing incentives for reforestation by granting twenty-five year licences to cut wood on Crown land, in return for agreements by licensees to engage in intensive forest management on both the public lands and private holdings. A high scale of royalties will help pay for replanting and maintenance of Crown forests.[250]

I. *Urban Forestry*

Urban forestry is the science of managing the single, open-grown trees and small wood lots found in the urban and near-urban setting. The legal aspects of this conservation issue have been as badly neglected as large scale forestry, if not worse. Nevertheless, conservation of urban and rural trees has recently been the subject of two law-oriented studies,[251] and Ontario has passed extensive amendments to The Trees Act.[252] The Trees Amendment Act, 1979[253] expands the right of municipalities to pass by-laws restricting the right of private owners to cut their wood lots. The amendments raise the penalties for breach of a municipal tree-cutting by-law from 1,000 to 5,000 dollars, allow the court to order anyone who illegally cuts trees to replant and maintain them,[254] and permit inspectors to enter private lands to enforce the by-laws.[255] However, the amendments authorize so many new exemptions from the municipal by-laws that conservationists have wondered whether they will give trees and wood lots less protection than the old Act.

J. *Preservation of Agricultural Land*

Quebec's Agricultural Land Protection Act was proclaimed in force on December 22, 1978.[256] Its object is to guarantee the protection of land within designated regions from development. The Minister of Agriculture will identify agricultural zones within the area surrounding each

---

the person performing reforestation work to apply approved expenses as a credit against stumpage fees (payments made by logging companies to the province, based on each log cut).

[248] R.S.O. 1970, c. 102, *as amended by* S.O. 1979, c. 92.

[249] *See* ONTARIO NATURALIST, Autumn 1979, at 34 for a brief critique of the Bill.

[250] The Globe and Mail (Toronto), Feb. 29, 1980, at B-1, col. 4.

[251] J.W. ANDRESEN & J. SWAIGEN, URBAN TREE AND FOREST LEGISLATION IN ONTARIO (prepared for the Canadian Forestry Service, Environment Canada, 1978); J. SWAIGEN & J.W. ANDRESEN, MODEL TREE PROTECTION BY-LAWS FOR CANADIAN MUNICIPALITIES (prepared for the Canadian Forestry Service, Environment Canada 1980).

[252] R.S.O. 1970, c. 468.

[253] S.O. 1979, c. 51 (in force June 22, 1979). For a critique of these amendments, *see* Swaigen, *The Trees Act Amendments*, in MUNICIPAL WORLD, Feb. 1979, at 31. The author's criticisms of the original Bill apply to the Act as well, although some improvements were made between first reading and third reading.

[254] S. 5 (amending R.S.O. 1970, c. 468, s. 6).

[255] S. 3 (amending R.S.O. 1970, c. 468, s. 4(2)).

[256] S.Q. 1978, c. 10.

municipality. Once the zoning has been finalized, no development will be authorized without the approval of the Agricultural Land Protection Commission, after hearing the views of the municipality.

British Columbia has had similar legislation, since 1973,[257] to halt the spread of urban sprawl into farmland. The legislation establishes an elaborate planning process leading to the designation of farmland as agricultural land reserves. The process involves a review of agricultural zoning plans by municipal governments, a provincial Agricultural Land Commission, and the provincial cabinet. Once land has been placed in an agricultural reserve, it cannot be removed or used for non-farm purposes without prior review by various government agencies.[258] In a 1978 decision, the British Columbia Court of Appeal ruled that an order of the Agricultural Land Commission authorizing a landowner to convert a farm to non-agricultural use does not suspend the operation of a municipal by-law that prohibits non-farm use.[259] Manitoba passed similar legislation in 1978.[260]

K. *Land Use Planning*

Alberta[261] and Quebec have recently passed new land use planning legislation; Manitoba has extensively amended The Planning Act[262] between 1976 and 1979;[263] and Ontario has produced a White Paper[264] and a draft Planning Act that has yet to be debated.

Quebec's Land Use Planning and Development Act[265] establishes rules for land use planning, to be implemented by County Councils. These Councils are empowered to adopt a development plan setting out the general aims of land development policy in the county. Every municipality within a county must adopt a planning program and zoning, subdivision, and building by-laws that are consistent with this plan. This Act covers most of the province with the exception of such areas as the Quebec Urban Community, the Montreal Urban Community, the Outaouais Region, and the James Bay Region, each of which is governed by its own planning legislation.[266]

---

[257] The Land Commission Act, S.B.C. 1973, c. 46 (renamed the Agricultural Land Commission Act by the Land Commission Amendment Act, 1977, S.B.C. 1977, s. 73, s. 1).

[258] Ss. 8, 9.

[259] *Re* Meadow Creek Farms Ltd. and District of Surrey, 82 D.L.R. 36, [1978] C.C.L. 4721 (B.C.S.C. 1977), *aff'd on other grounds* 89 D.L.R. (3d) 47 (C.A. 1978).

[260] The Farm Lands Protection Act, S.M. 1977, c. 44.

[261] The Planning Act, 1977, S.A. 1977 (in force Apr. 1, 1978). *See* Elder, *The New Alberta Planning Act*, 17 ALTA. L. REV. 434 (1979).

[262] S.M. 1975, c. 29.

[263] An Act to Amend the Planning Act, S.M. 1976, c. 51; S.M. 1977, c. 35; S.M. 1979, c. 16.

[264] GOVERNMENT OF ONTARIO, WHITE PAPER ON THE PLANNING ACT (1979).

[265] S.Q. 1979, c. 51 (in force as of June 1, 1980).

[266] Quebec Urban Community Act, S.Q. 1969, c. 83; Montreal Urban Community Act, S.Q. 1969, c. 84; Outaouais Regional Community Act, S.Q. 1969, c. 85; James Bay Region Development Act, S.Q. 1971, c. 34.

The James Bay area is of particular interest from an environmental perspective. In addition to provincial legislation dating back to 1971, the area is subject to federal[267] and provincial legislation[268] implementing an agreement between the two senior governments and the Cree and Inuit of northern Quebec. Under this agreement, the natives surrendered their aboriginal rights to about sixty per cent of Quebec's land mass in return for money, hunting and fishing rights, and a degree of self-government and control over future development. The agreement also included elaborate environmental impact assessment procedures.

Another important land use planning statute is the Northern Pipeline Act,[269] which facilitates the planning and construction of a pipeline for the transmission of natural gas from Alaska through Canada. The Act establishes the Northern Pipeline Agency[270] to supervise the planning and construction of the pipeline in conjunction with the National Energy Board. A schedule to the Act binds the pipeline companies to comply with undertakings given at National Energy Board hearings on their applications for certificates of public convenience and necessity.[271] The undertakings include precautions to protect the environment, fisheries, and farmland. The companies are also subject to any orders and directions that the Agency may give.

This wholesale revision of land use planning legislation has been paralleled by the unprecedented growth of laws in a related area: the preservation of buildings of historic and architectural interest.[272] The recent growth of the "heritage" movement, undoubtedly stimulated by the celebration of Canada's Centennial in 1967 and the establishment of a national "trust" called Heritage Canada, has led not only to stronger heritage legislation in several provinces, but also to litigation.[273]

V. The Supreme Court of Canada and Environmental Law

The Supreme Court of Canada has been active in interpreting environmental law. Three cases in particular are worthy of mention:

---

[267] James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1977-78, c. 32.

[268] An Act approving the Agreement Concerning James Bay and Northern Quebec, S.Q. 1976, c. 46. Northern Quebec is also subject to a series of laws assented to Dec. 22, 1978 including the Land Regime in the James Bay and New Quebec Territories Act, 1978, S.Q. 1978, c. 93 and the Environment Quality Amendment Act, 1978, S.Q. 1978, c. 94.

[269] S.C. 1977-78, c. 20.

[270] S. 4.

[271] Schedule III, s. 7.

[272] *E.g.*, Alta's Historical Resources Act, S.A. 1974, c. 5; B.C.'s Heritage Conservation Act, S.B.C. 1977, c. 37; Que.'s Cultural Property Act, S.Q. 1972, c. 19; N.B.'s Municipal Heritage Preservation Act, S.N.B. 1978, c. M-21.1; The Ontario Heritage Act, 1974, S.O. 1974, c. 122.

[273] *E.g.*, *Re* Mozambique Invs. Ltd. and City of Toronto, 9 O.R. (2d) 721, 61 D.L.R. (3d) 593 (Div'l Ct. 1975); E. & J. Murphy Ltd. v. City of Victoria, 73 D.L.R. (3d) 247 (B.C.C.A. 1976).

Interprovincial Co-operatives Ltd. v. The Queen,[274] *Regina v. Sault Ste. Marie*,[275] and *Pugliese v. National Capital Commission*.[276]

In *Interprovincial Co-operatives Ltd. v. The Queen*,[277] the Supreme Court overruled a decision of the Manitoba Court of Appeal which had upheld the constitutionality of legislation passed by the Manitoba Government to assist fishermen in obtaining compensation for loss of their livelihood as a result of mercury contamination of the fisheries. Interprovincial Co-operatives Ltd. and Dryden Pulp & Paper Ltd., the defendants, operated chlor-alkali plants in Saskatchewan and Ontario, respectively, under valid licences from the authorities in those provinces. The plants discharged mercury into rivers that drained into Manitoba. The mercury was carried into Manitoba waters and fish became contaminated, unsafe for human consumption, and unmarketable. Consequently, the Manitoba authorities refused to permit commercial fishing. Commercial fishermen who lost their income as a result of this ban were given forgiveable loans pursuant to section 2 of the Fishermen's Assistance and Polluters' Liability Act.[278]

This statute authorized the Manitoba Government to make payments to fishermen who suffered financial loss. It further authorized the government to be subrogated to the fishermen's common law right to sue the polluter for recovery of the fishermen's loan. The Act also purported to relax the common law requirements for proof of causation and to abolish or modify several common law defences to a suit for damages in tort. On the basis of this statute, as well as the common law torts of negligence, nuisance, and trespass, the Manitoba Government sued the two companies to recover assistance payments of approximately two million dollars made to 1,590 fishermen. The companies moved to have the portions of the claim based on the Fishermen's Act struck out on the ground that the legislation was *ultra vires* the provincial legislature.

Four of the seven Supreme Court judges who heard the motion ruled that the provincial government could not legislate to impose liability for loss incurred within the province as a result of the discharge of a contaminant in another province.[279] The dissenting judges held that the legislation was valid as an exercise of the province's jurisdiction over property within the province.[280] The case left an important question unanswered: if the affected province does not have jurisdiction over interprovincial pollution, who does? Three judges stated that supplementing common law remedies for extra-territorial pollution would

---

[274] [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321 (1975).

[275] 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161 (S.C.C. 1978).

[276] [1979] 2 S.C.R. 104, 97 D.L.R. (3d) 631.

[277] *Supra* note 274.

[278] S.M. 1970, c. 32.

[279] The majority consisted of the judgment of Pigeon J., concurred in by Martland and Beetz JJ. and a separate opinion by Ritchie J.

[280] Laskin C.J.C. with whom Judson and Spence JJ. concurred.

require an act of Parliament,[281] while one stated that only if the pollution was not justified in the province in which it originated could the affected province successfully enforce its own legislation.[282] As these remarks were *obiter*, to answer the question it will take a ruling on the validity of federal legislation or initiating-province legislation which purports to affect common law remedies for interprovincial pollution.

In *Regina v. Sault Ste. Marie*,[283] the Court established a new basis of liability for "public welfare" offences. The case arose out of an appeal by the City of Sault Ste. Marie to quash its conviction on a charge of causing or permitting the discharge of leachate from a garbage dump into nearby watercourses, contrary to the Ontario Water Resources Act.[284] The dump had been operated by a co-accused, Cherokee Disposals and Construction Ltd., under contract to the city which disclaimed any responsibility for the wrong-doing of this independent contractor. The city argued that the charges against it were duplicitous because they included discharging, causing a discharge, and permitting a discharge in one count. More importantly, the city argued that the offence of polluting under the Ontario Water Resources Act required a *mens rea* which the city lacked. The traditional approach to statutory interpretation, since the leading case of *Regina v. Pierce Fisheries Ltd.*,[285] was to find that liability under provincial statutes to protect the public welfare is virtually absolute in the absence of qualifiers such as "willfully" or "knowingly". The Supreme Court rejected this traditional dichotomy and stated that there are three kinds of offences, those for which liability is absolute, those requiring *mens rea*, and those "strict liability" offences for which the defence of due diligence or reasonable care is available.

The decision is eminently sensible, but it will mean that provincial legislatures will have to explicitly state that their statutes create absolute liability if they want to be sure of obtaining convictions in cases where the person charged has made efforts to avoid harm. In the alternative, prosecutors will have to be prepared to call evidence in reply to defence evidence that reasonable precautions were taken to avoid breaking the law. What is "reasonable" will probably depend largely on the circumstances of each case.

Pugliese v. National Capital Commission[286] was a case in which subsidence of land was allegedly caused by deprivation of groundwater. The Court essentially had to decide between a line of cases holding that actionable nuisance arises where land is undermined and subsides as a

---

[281] *Supra* note 274, at 516, 53 D.L.R. (3d) at 359 (Pigeon, Beetz and Martland JJ.).

[282] *Supra* note 274, at 521-23, 53 D.L.R. (3d) at 347-49 (Ritchie J.).

[283] *Supra* note 275. Recent comments on this case include Hutchison, *Sault Ste. Marie, Mens Rea and the Halfway House: Public Welfare Offences Get a Home of Their Own*, 17 OSGOODE HALL L.J. 415, and Reid, *R. v. Sault Ste Marie: A Comment*, 28 U.N.B.L.J. 205 (1979).

[284] R.S.O. 1970, c. 332.

[285] [1971] S.C.R. 5, 12 D.L.R. (3d) 591 (1970).

[286] *Supra* note 276, *aff'g on other grounds* 17 O.R. (2d) 129, 79 D.L.R. (3d) 592 (C.A. 1977).

result of a neighbour's activities,[287] and cases saying that damage flowing from one neighbour and depriving another of groundwater is not actionable.[288]

The plaintiffs, who were owners of residential properties, claimed that the water table below their properties was substantially lowered by construction of a collector sewer on nearby lands causing serious damage to their homes and lands due to the resulting subsidence. The case went to the Ontario Court of Appeal for determination of a threshold question of law: whether there is any right to maintenance of groundwater. If there is, the infringement of groundwater can form the basis of an action for damages. The leading English decision of *Acton v. Blundell*[289] held that there is not. However, a recent decision of the Manitoba Court of Appeal held that there is a right of action in negligence or nuisance for crop damage resulting from lowering of the water table.[290]

The Ontario Court of Appeal held in *Pugliese* that an owner of land does not have an absolute right to the support of subterranean water not flowing in a defined channel, but does have a right not to be subjected to interference with the support of such water amounting to negligence or nuisance.[291] The court rejected the position that breach of the Ontario Water Resources Act,[292] by pumping water in excess of amounts set out in permits under that Act, creates a statutory basis for liability.

The Supreme Court of Canada dismissed the defendants' appeals but on different grounds. The Court based the plaintiffs' right of action on the breach of the Ontario Water Resources Act. It ruled that section 37, which requires permits to pump excessive amounts of groundwater, is a restriction on the right, previously enjoyed by landowners, to abstract water from undefined channels with impunity from prosecution. Since the penal sanctions provided by the Act are inadequate in light of the damage resulting from the breach, an action in nuisance or negligence is available.

It remains to be seen whether *Pugliese* overrules the common law rule that injury resulting from groundwater extraction is *damnum absque injuria* or merely creates an exception in certain cases: where land subsides or where the Ontario Water Resources Act or similar legislation is breached. On the basis of statements in both the Court of Appeal and the Supreme Court, it would appear that an abstraction of water may now

---

[287] Jordeson v. Sutton, Southcoates and Drypool Gas Co., [1899] 2 Ch. 217, 68 L.J. Ch. (n.s.) 457 (C.A.); Trinidad Asphalt Co. v. Ambard, [1899] A.C. 594, 81 L.T.R. (n.s.) 132 (P.C.).

[288] Acton v. Blundell, 13 L.J. Ex. (n.s.) 289, 152 E.R. 1223 (1843). The cases are reviewed in Langbrook Properties, Ltd. v. Surrey County Council, [1969] 3 All E.R. 1424 (Ch.).

[289] *Id.*

[290] Penno v. Government of Manitoba, [1976] 2 W.W.R. 148, 64 D.L.R. (3d) 256 (Man. C.A. 1975).

[291] 17 O.R. (2d) 129, at 157-58, 79 D.L.R. (3d) 592, at 621.

[292] R.S.O. 1970, c. 332, s. 37, *as amended by* S.O. 1972, c. 1, s. 70(5) and S.O. 1974, c. 19, s. 2(*b*)(i).

amount to actionable nuisance or negligence in a wide variety of circumstances. Perhaps more importantly for tort law in general, *Pugliese* appears to provide the basis for the creation of many new liabilities founded on breach of statute. The previous leading case had held that breach of statute was merely *prima facie* evidence of negligence,[293] whereas *Pugliese* lays the groundwork for the possible development of an independent tort remedy on the basis of breach of statute alone.

VI. CONCLUSION

The expansion of environmental protection and related legislation has been remarkable. However, the enforcement staff of virtually every environmental protection agency is still pitifully small, and the budgets of environmental departments are usually less than one per cent of the provincial budget.[294] Whether the legislation will be enforced may depend upon the extent to which the public is permitted to enforce it and whether the legislation involves discretionary enforcement or imposes duties on government to act.

As for the courts, one might cautiously conclude that they have shown slightly more understanding of environmental issues and more sympathy than was demonstrated in the past towards the aspirations of individuals and public interest groups seeking access to government institutions. Generally they remain very conservative in their interpretations of the law.

As for the future, economic instability and energy needs are unlikely to submerge environmental concerns. Our society is dependent on toxic substances and dangerous technologies to serve every function from heating our homes to drying our hair. These technologies, which are a threat to human and environmental health and safety, will keep environmental concerns before the public and the decision-makers.

Although much as been done in the last five years, there are still many areas in which little progress has been made. Protection of parkland from development, preservation of wetlands, enforcement of endangered species legislation, transport and disposal of toxic substances, a right to sunlight for owners of solar energy collectors, and other laws promoting energy conservation and the use of renewable rather than non-renewable sources of energy are but a few examples of environmental issues in need of expansion. One thing is certain: the next five years of environmental law and litigation will tell whether we are moving towards legal lip service or a fundamental right to a safe and sound environment.

---

[293] Sterling Trusts Corp. v. Postma, [1965] S.C.R. 324, at 329-30, 48 D.L.R. (2d) 423, at 429 (1964).

[294] Donnan. *supra* note 33.