SUBSTANTIVE ENVIRONMENTAL RIGHTS IN CANADA

Elaine L. Hughes[*]
and
David Iyalomhe[**]

In this article, the authors examine what it means to have a "right" to a healthy environment and how substantive environmental rights could be given legal effect. The authors then examine existing and proposed Canadian legislation—the Yukon Environment Act, the Ontario Environmental Bill of Rights and the Canadian Environmental Protection Act, 1998—to see if these statutes provide for the protection of the environmental rights envisioned as necessary. Having identified certain shortcomings in the existing law based on their "ideal," the authors then conclude with an examination of the benefits which current Bills of Rights can nevertheless provide in an era of decreasing government capacity to protect environmental quality.

Dans cet article, les auteurs examinent ce que cela signifie d'avoir « droit » à un environnement sain et ils se demandent comment on pourrait donner un effet juridique aux droits environnementaux fondamentaux. Les auteurs examinent ensuite des lois canadiennes existantes et projetées, notamment la Loi sur l'environnement du Yukon, la Charte des droits environnementaux de l'Ontario et la Loi canadienne sur la protection de l'environnement de 1998, afin de déterminer si ces lois prévoient la protection des droits environnementaux qui sont considérés comme nécessaires. Après avoir cerné certaines failles du droit existant en se fondant sur leur « idéal », les auteurs concluent en examinant les avantages que les Chartes des droits actuelles peuvent malgré tout présenter à une époque où la capacité du gouvernement de protéger la qualité de l'environnement va en diminuant.

---

[*] Associate Professor, Faculty of Law, University of Alberta. The author gratefully acknowledges the assistance of Annalise Acorn and David Schneiderman in the preparation of this article.

[**] LL.M., University of Alberta; Member of the Nigerian Bar; presently Student-at-law, Blake, Cassels & Graydon, Calgary. The author wishes to thank Vicky Iyalomhe, David Percy, John McWilliams, Tim Martin and Dan Fournier for their support and encouragement.

TABLE OF CONTENTS

I. INTRODUCTION

Over the years, one recurring theme within the environmental law community has been:

> [T]he need for a set of principles and rules to outline citizens' rights with respect to the environment; the duties of government pertaining to natural resource use and the prevention of environmental degradation; and the role of the public in environmental decision-making.[1]

Despite the proliferation of environmental legislation in the past 20 years, the perceived need to define and articulate such environmental rights and concomitant duties stems from the public's continuing problems with lack of government accountability, uncertain access to the judicial process and an inability to effectively participate in environmental decisions.[2] These concerns are now exacerbated, as government seems to be losing its operational capacity and becoming even more reliant on industry good-will.[3] Simultaneously, environmental quality continues to deteriorate.[4] People are, therefore, continuing to look at ways in which environmental protection can be improved. Many take the position that a useful step would be for the government to recognize explicitly that citizens have a legal right to a healthy or beneficial environment.

Yet, what does it mean to say that citizens have a "right to a healthy environment"? It has been clearly articulated that, "an entity cannot be said to hold a legal right unless and until *some public authoritative body* is prepared to give *some amount of review* to actions that are colourably inconsistent with that 'right'"[5] and that, in order to be effective, three additional criteria must be met:

> [F]irst, that the thing can institute legal actions *at its behest*; second, that in determining the granting of legal relief, the court must take *injury to it* into account; and, third, that relief must run to the *benefit of it*.[6]

What has not been so clearly articulated, however, is the *substance* of environmental rights: how one can tell what actions are inconsistent with those rights

---

[1] P. Muldoon & J. Swaigen, "Environmental Bill of Rights" in D. Estrin & J. Swaigen, eds., *Environment on Trial: A Guide to Environmental Law and Policy*, 3d ed. (Toronto: Emond Montgomery, 1993) c.25 at 794 [hereinafter *Trial*].

[2] *Ibid.*

[3] Standing Committee on Environment and Sustainable Development, 3d report, May 1998, "Enforcing Canada's Pollution Laws: The Public Interest Must Come First!," http://interparl.parl.gc.ca/InfocomDoc/36/1/ENSU/Studies/Reports/ensurp03-e.htm> [hereinafter *Standing Committee Report*]. These concerns will be discussed in additional detail later in the paper.

[4] Report of the Commissioner of the Environment and Development, May 1998, "Greening the Government of Canada — Strategies for Sustainable Development," http://www.oag-bvg.gc.ca/domino/reports.nsf/html/c801ce.html.

[5] C. Stone, "Should Trees Have Standing?" (1972) 45 U.S. Cal. L. Rev. 450 at 458. [hereinafter *Stone*] [emphasis in original].

[6] *Ibid.* at 458.

and what constitutes an "injury" to the rights-holder. In short, the key question is this: what is the nature and scope of a "right to a healthy environment"?

We are not, however, concerned with this issue purely in the abstract — several Canadian jurisdictions have now enacted environmental Bills of Rights legislation. Accordingly, in the following discussion, we focus our analysis on the concept of environmental rights as they have been enacted in Canada, and attempt to evaluate the extent to which they have been formulated in a way which could provide some fundamental protection of environmental quality in this country.

II. THE DEBATE OVER ENVIRONMENTAL RIGHTS

It is necessary at the outset to make explicit some assumptions. Clearly, advocates of environmental rights are convinced that rights discourse itself has some value, and that there is some benefit to having rights, even if it does not prove to be some type of ultimate solution.[7] Thus, as we go on to look at the substance of environmental rights, we will assume that the rights approach will have *an* effect—some practical consequences—and that advocates of the rights approach are correct in their assertion that being a rights-holder is better than being "rightless."[8]

Even amongst rights advocates, there has been a longstanding debate about environmental rights. That debate can be divided into three major issues or groups of issues.[9] The first is the realm of the theorist, centred on the question of whether environmental rights and duties exist and, if so, what is their nature?[10] Regardless of whether any legal recognition exists, is there a moral right to a healthy environment? Is such a right individual or collective? Is it a positive or a negative right? Can we conceptualize such rights as anthropocentric (i.e., human rights to environmental quality) or ecocentric (animal rights, species' rights or rights for nature)? Do these rights extend to future generations? Are there duties that accompany the rights? What is an appropriate scope for such a right or group of rights, and is there a social consensus on this?[11]

There is, of course, an extensive body of literature by philosophers, ethicists and

---

[7] J. Swaigen & R. Woods, "A Substantive Right to Environmental Quality" in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981) c.4 at 197-99 [hereinafter *Swaigen & Woods*].

[8] *Ibid.* at 197-202; see also V. Leary, "Implications of a Right to Health" [hereinafter *Leary*] in K. Mahoney & P. Mahoney, eds., *Human Rights in the Twenty First Century: A Global Challenge* (Dordrecht: Martinus Nijhoff, 1993) at 481 [hereinafter *Mahoney*]. This pre-supposes that environmental rights will prevent erosion of environmental quality and that enforcing — at a minimum — the status quo would be preferable to a continuing lack of rights.

[9] A. Eide, "Strategies for the Realization of the Right to Food" in *Mahoney*, *ibid.* at 459 [hereinafter *Eide*].

[10] *Trial*, *supra* note 1 at 795.

[11] E. Hughes, "Civil Rights to Environmental Quality" [hereinafter *Hughes*] in E. Hughes, A. Lucas and W. Tilleman, eds., *Environmental Law & Policy*, 2d ed. (Toronto: Emond Montgomery, 1998) at 404-05 [hereinafter *Environmental Law & Policy*].

political and legal theorists that discusses and debates these very questions.[12] Often, the conclusions of the authors are shaped by their theory about the basis of rights—whether they arise from a social contract, from socio-economic utility, from the intrinsic worth of the individual, from some law of human nature or from some other theoretical basis.[13] As a generalization, analysts conclude that there are moral rights to environmental quality, although there is little agreement about the nature, scope or ambit of such rights. However, on occasions where the issue is raised, there is usually agreement that such rights should, like other civil rights, be legally enforceable,[14] and that this potentially would prove useful in solving environmental problems.

This brings us to the second area of debate, then, which focuses on the question: if one chooses to make environmental rights legally enforceable, how can this best be done? Should the rights be procedural or "substantive"? Should they be statutory or constitutional? Should they be enforceable against government or private persons or both? In what forum should such rights be asserted? What remedies should be available? How should one resolve conflicts between environmental and other rights, such as property rights? In "hard" cases, should environmental rights provide a presumptive solution?[15]

Again, there is a fairly substantial body of literature that puts forward a variety of answers to these questions.[16] Generally speaking, one can say that the form of legal protection envisioned by writers in the area is shaped by the authors' views on the nature and scope of the moral right. Thus, for example, a different remedy might be suggested by someone who views environmental rights as collective rights than would be put forward by someone who views those rights as individual rights. The writers' views about the nature of participatory democracy are also influential.[17] For example, one might choose to have the courts as a final adjudicator if one views their role as being that of an overseer of government, preventing abuse of authority by government officials and ensuring fairness and impartiality.[18] On the other hand, one might view the courts as inappropriate policy-makers, and any expanded role of the judiciary as fundamentally undemocratic.[19]

Clearly, the arena of environmental rights is filled with a wide variety of contentious issues, all of which must be settled in order to come up with a concrete proposal. Assuming, however, that a society can decide on the nature of environmental

---

[12] See, *e.g.*, L. Tribe, "Ways Not to Think About Plastic Trees: New Foundations in Environmental Law" (1974) 83(7) Yale L.J. 1315; C. Stone, "Legal Rights and Moral Pluralism" (1987) 9(3) Env. Ethics 281; G. Varner, "Do Species Have Standing?" (1987) 9(1) Env. Ethics 57.

[13] *Swaigen & Woods, supra* note 7, at 202-03.

[14] *Trial, supra* note 1 at 795; *Hughes, supra* note 11 at 403.

[15] *Swaigen & Woods, supra* note 7 at 199-200; *Hughes, supra* note 11 at 405.

[16] See, *e.g.*, *Swaigen & Woods, supra* note 7; D. Gibson, "Constitutional Entrenchment of Environmental Rights" [hereinafter *Gibson*] in N. Duplé, ed., *Le droit à la qualité de l'Environnement: un droit en devenir, un droit a definir* (Montreal: Québec/Amérique, 1988) [hereinafter *Duple*]; P. Elder, "Legal Rights for Nature–The Wrong Answer to the Right(s) Question" (1984) 22(2) Osgoode Hall L.J. 285 [hereinafter *Elder*].

[17] *Trial, supra* note 1 at 795.

[18] *Trial, supra* note 1 at 803; *Hughes, Supra* note 11 at 434.

[19] *Ibid.*

rights, their scope and the form that they should take in law, one is then left with the third and most fundamental set of questions. Will better environmental protection actually result? Can it be achieved in a way that achieves distributive justice? For example, will it be equitable, just and fair? Is there a way to bring everyday reality into conformity with our catalogue of environmental rights?[20] Finally, what are the social implications of recognizing environmental rights?

In Canada, we have begun to formulate some tentative answers to these questions. In fact, a number of proposals for environmental bills of rights *have* been made in this country since 1979 in Quebec, Ontario, British Columbia, Saskatchewan, Alberta and both territories. For a decade, the fate of such Bills was either death on the order paper or defeat by the majority government of the day.[21] Eventually, in 1990, the Northwest Territories made history by passing Canada's first Environmental Bill of Rights.[22] In 1991, the Yukon also passed an environmental bill of rights as part of its new *Environment Act*.[23] Saskatchewan introduced environmental rights legislation in 1992 that has since been abandoned.[24] After extensive study, Ontario enacted environmental rights legislation in 1993.[25] The Federal Government and other provinces (including British Columbia) have been discussing the merits of such legislation during recent law reform processes.[26] Finally, we have an opportunity, not only to see what view of environmental rights is being adopted in Canada, but to test the legislation for both its effectiveness and fairness.

The analysis of these issues that follows is loosely structured on the three areas of debate outlined previously. In the first stage of analysis, we attempt to conceptualize a theory of environmental rights which would encompass the *barest minimum content* of a socially-acceptable standard. This would allow us to evaluate whether the stated goals or objectives of the Canadian legislation fell short at the outset. In the second stage, in order to determine whether the Canadian laws are making use of the mechanisms we envisage as necessary, we turn to the question of how our catalogue of basic rights could be given legal content. Finally in the third stage, some concluding observations are made about existing environmental bills of rights to see what kinds of changes might be needed to ensure that each of our citizens actually enjoys these rights and to discuss whether current legal developments promote or inhibit such changes.

---

[20] *Hughes*, *supra* note 11 at 433-36. See also *Eide*, *supra* note 9 at 459.

[21] The sole exception was the passage of the *Quebec Environmental Quality Act*, R.S.Q. 1997, c.Q-2, s.19.1, which gave every natural person "a right to a healthy environment...to the extent provided for by this act and the regulations." In essence, a statutory tort was created.

[22] *Environmental Rights Act*, S.N.W.T. 1990, c.38.

[23] *Environment Act*, S.Y. 1991, c.5.

[24] See generally Saskatchewan, Legislative Assembly, Standing Committee on the Environment, First Report on Environmental Rights and Responsibilities, April 19, 1993.

[25] *Environmental Bill of Rights, 1993* S.O. 1993, c.28 [hereinafter *Environmental Bill of Rights*].

[26] British Columbia originally included an environmental bill of rights in its draft *Environmental Protection Act*, but that portion of the draft was abandoned in October 1995: See Environmental Law Update (Continuing Legal Education Society of British Columbia, 1995) at 1.1.28. The new federal *Canadian Environmental Protection Act, 1998, Bill C-32* (*infra* note 180) also includes a draft environmental bill of rights.

III. MINIMUM CONTENT OF ENVIRONMENTAL RIGHTS

Our starting point is the proposition that environmental rights must include, at a minimum, the right to a level of environmental quality which will ensure the survival of humanity. Whatever else we are, humans are biological organisms, and thus have certain basic biological needs that must be met either from the environment or the energy, resources and inspiration the environment provides to fuel our technology and culture.[27] At a basic biological level, as a species, we need air, water, food, shelter materials and other humans to survive.[28]

There are important *dimensions* to each of these environmental components that must be considered. First, there is a *quantitative* dimension: humans must have adequate supplies of air, water, food, shelter materials and other humans. Second, there is a *qualitative* dimension: these essentials must be uncontaminated, safe or reasonably clean. Finally, there is a *temporal* dimension. Our adequate supplies of reasonably clean air, water, food, shelter and other humans must be sustained through generations to ensure our species' survival.[29] Arguably, this is the level of environmental quality which would meet the human species' most basic biological survival needs and which is referred to in the literature as a "right to a reasonable level of environmental quality." This would also seem to comprise the minimum content of a collective right to environmental quality.

In Canada, human rights have generally been conceptualized as individual, rather than collective.[30] If we turn to the question of individual biological survival (rather than species' survival), are there any other factors which require our consideration? Arguably, for individual survival, some level of medical or health care is fundamental. Thus, one sees reference to the "right to a healthy environment" expressed by many authors.

Additionally, each individual needs *access* to their fair share of the basic resources outlined above; there is a notion of distributive justice which must be incorporated if one accepts that individual welfare as "morality and as a legitimate purpose of a just society."[31] As moral rights, environmental rights would be universal rights of all persons[32] and there should therefore be a level of individual entitlement to environmental quality, without discrimination.[33]

---

[27] K. Mikelson & W. Rees, "The Environment: Ecological and Ethical Dimensions" in *Environmental Law & Policy, supra* note 11 at 7-11 [hereinafter *Mikelson & Rees*]. Given our acceptance of this view of humans as biological organisms, we are persuaded by the "indispensability theory" of environmental rights, which considers a right to environmental quality to be a pre-requisite for human survival and thus a pre-condition for the enjoyment of all other human rights. See N. Gibson, "The Right to a Clean Environment" (1990) Sask. L.Rev. 54 at 16 [hereinafter *N. Gibson*].

[28] H. Rolston, "Rights & Responsibilities on the Home Planet" (1993) 18 Yale J. of Int'l L. 251 at 259-60 [hereinafter *Rolston*].

[29] *Mikelson & Rees, supra* note 27 at 14-15.

[30] D. Saxe, *Environmental Offences: Corporate Responsibility and Executive Liability* (Aurora: Canada Law Book, 1990) at 18.

[31] *Leary, supra* note 8 at 482.

[32] *Rolston, supra* note 28 at 255.

[33] *Leary, supra* note 8 at 482-83.

Thus, our discussion proceeds on the basis that, at a minimum, an individual citizen's environmental rights include access to a fair and adequate share of reasonably clean air, water, food, shelter, health care and human companions. Given the temporal dimensions of environmental rights outlined previously, both present and future persons are entitled to their fair share of these resources.

This "ecological" view of the minimum components of environmental rights conforms quite closely to the work of scholars in the international human rights field, particularly those studying the rights to life, food and health.[34] For example, the 1987 Special Rapporteur to the U.N. Economic and Social Council described the right to food embodied in Article 11 of the International Covenant on Economic, Social and Cultural Rights:[35]

> Everyone requires food which is (a) sufficient, balanced and safe to satisfy nutritional requirements, (b) culturally acceptable, and (c) accessible in a manner which does not destroy one's dignity as a human being.[36]

In addition, "food which is adequate qualitatively, quantitatively and culturally, should be accessible in a sustained way."[37]

What positive measures need to be taken to secure such basic biological survival rights? First, to supply the essentials of life, it is necessary to maintain essential biological processes.[38] Thus, for example, humans need to have photosynthesis continue to supply atmospheric oxygen, and to maintain hydrological cycles to supply fresh water. Second, the only known way to maintain essential biological processes is to maintain functioning ecosystems.[39] There is no artificial or technological substitute.[40] To maintain functioning ecosystems (*i.e.* natural processes) scientific consensus tells us to do things such as: preserve biological diversity;[41] maintain soil fertility and the productive capacity of the land;[42] protect the oceans;[43] receive sunlight only at wavelengths to which the planet's biology is accustomed;[44] maintain climatic stability; and protect ourselves and our environment from toxic contamination.[45] Of course, scientific uncertainty makes the specifics of such a list debatable; one can only work with the best scientific advice presently available. However, within the limits of

---

[34] R. Robertson, "The Right to Food in International Law" in *Mahoney, supra* note 8, 451 at 452 [hereinafter *Robertson*]. As noted previously, however, a reasonably clean environment is a pre-requisite for the fulfilment of these other rights. See *supra* note 27 and accompanying text.

[35] International Covenant on Economic, Social and Cultural Rights, (1966) 993 U.N.T.S. 3, 1976 Can. T.S. No. 46, in force, including Canada, 1976.

[36] A. Eide as quoted in *Robertson, supra* note 34 at 452.

[37] *Robertson, ibid.* at 452; see also *Rolston, supra* note 28 at 260.

[38] *Rolston, ibid.* at 260.

[39] *Ibid.* 260-62.

[40] *Mikelson & Rees, supra* note 27 at 16.

[41] *Rolston, supra* note 28 at 260.

[42] *Ibid.* See also F. Roots, "Population, 'Carrying Capacity' and Environmental Processes" [hereinafter *Roots*] in *Mahoney, supra* note 8, at 535.

[43] *Ibid.* at 535.

[44] *Ibid.* at 534.

[45] *Rolston, supra* note 28 at 260.

scientific knowledge, such are the kinds of things that humans have rights to, if the right to environmental quality is to have any meaning, even at the level of mere survival.

Would people be satisfied with a level of environmental quality that merely ensured base survival? "Beyond basic life support, natural resources provide second-level societal support to humans, without which societies ... as we know them could not develop."[46] We need energy, materials, inspiration and resources in any cultural endeavour, be it education, employment, science, art, engineering, religion, politics or economics. Cultural activities are not only reliant upon the resources provided by the environment, but the environment is the place in which all cultural activity is located. Thus, environmental degradation, in all the places in which it is prevalent, threatens various human rights ranging from the "right to health, right to privacy, the right to suitable working conditions, the right to an adequate standard of living, and rights to political participation and information."[47] Accordingly, it is arguably necessary to extend our concept of environmental rights to ensure we have a level of environmental quality which can sustain such fundamental aspects of human cultures or social organizations. The difficulty, of course is in separating such basic cultural supports from short-term socially defined desires or practices which—in modern consumer societies—are antithetical to human survival, because they undermine environmental integrity and resource supplies.

It would seem impossible to make a comprehensive description of the level of environmental quality necessary to sustain human culture, yet *some* level of environmental amenities seem needed to ensure human well-being, beyond mere health or physical survival.[48] The best that most analysts seem to be able to do is to describe this as a right to a level of environmental quality that is "beneficial" to human culture,[49] or which is sufficient to maintain *a* socioeconomic system (not necessarily *the* [existing] socioeconomic system).[50]

For vast numbers of people in the world, necessities such as clean water and adequate food supplies are already often beyond their grasp,[51] and these alone would vastly improve their quality of life. Thus, particularly in developing countries, "minimum" environmental rights would provide a very real benefit, especially in those countries whose governments are mostly concerned with financial considerations and economic development, to the detriment of human and environmental values and protection.[52] For example, not long ago it was reported that several African countries accepted the dumping of toxic industrial waste in their territories, without considering

---

[46] *Roots, supra* note 42 at 536.

[47] Dinah Shelton, "Human Rights, Environmental Rights and the Right to Environment" (1991) 28(1) Stanford J. of Int. L. 103 at 112.

[48] *Rolston, supra* note 28 at 262.

[49] *Gibson, supra* note 16.

[50] *Roots, supra* note 42 at 544.

[51] World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford U. Press, 1987).

[52] D. Iyalomhe, *Environmental Regulation of the Oil and Gas Industry in Nigeria: Lessons From Alberta's Experience* (LL.M. Thesis, University of Alberta, 1998) at 130-31 [hereinafter *Iyalomhe*].

the implications of their actions on the health of their citizenry or the environment.[53] Aggrieved individuals, environmental organizations and other concerned bodies might well find the entrenchment of environmental rights a viable instrument in the prevention of this and other similar incidents[54] in their countries.

In a wealthy nation such as Canada, on the other hand, this "minimum" level of environmental quality would seem to be a rather bleak standard, lacking in the amenities of life that would seem preferable or ideal. Environmental rights (and enabling legislation) which protected us only from a level of degradation where sheer survival is a struggle or an impossibility would not, we submit, meet our social expectations. Nor should persons in other countries be required to settle for such a quality of life. This suggests that (a) the substantive content of environmental rights must exceed the ecological minimum, or (b) the rights must be reconceptualized to include a right to see that our present environmental quality, and the quality of culture that goes with it, does not deteriorate to a mere-survival level.

To summarize, at this point we have adopted the following view of environmental rights:

1. A bundle of environmental rights does exist. There is a group of rights shared collectively and individually that are required to ensure the biological survival of the human species and to support basic human culture. Additional rights may also be required by present and future individuals.
2. Although the rights are described in anthropocentric terms, they necessarily include the protection of ecosystems and other species.[55]
3. Environmental rights have a minimum scope, as follows:
   a) Humans have a collective right to adequate supplies, over time, of safe air, food, water, shelter materials, and the companionship of other humans, and an individual right to health care.
   b) Both individuals and future persons have a right of access to their fair share of these resources.
   c) Accordingly, humans have a right to have essential biological processes and functioning ecosystems sustained or maintained.
   d) In addition, humans have a right to a level of biological function that supports a socioeconomic system and that benefits human culture.
4. Ideally, environmental rights would protect a much higher (yet still ecologically possible) level of amenities than suggested by this minimum scope, and would ensure that biological and cultural support systems do not deteriorate to a survival-

---

[53] J. Thompson, "Laying Africa Waste" (September 1988) 252 New Africa at 35; F. Misser, "Africa: The Industrial World Dumping Ground?" (July 1988) 119 African Business at 10. In one case, a poor Nigerian farmer allegedly allowed an Italian company to deposit imported toxic waste on his land, which was close to a local port: P. Ezeh, "Nigerians Who Stole Toxic Waste" (October 1988) 253 New African at 22.

[54] For example, reported cases of oil pollution in the developing world might also be minimized. See *Iyalomhe*, *supra* note 52.

[55] Pragmatically, we have chosen to focus on human rights rather than animal rights or rights for nature, as it is a familiar approach taken by existing Canadian legislation; in addition, arguments can be made that suggest a more radical approach would not necessarily achieve different results: see *Elder*, *supra* note 16.

only level.

5. To clarify the necessary actions, duties or obligations that arise as a result of the stated content of human rights to environmental quality, we have recommended a notion of acting on the best scientific consensus currently available as a guide to decision-making.

IV. ASCRIBING LEGAL CONTENT TO ENVIRONMENTAL RIGHTS

Having elaborated a minimum content for environmental rights, and adopted a science-driven method of specifying the nature of the activities that must be undertaken as a result, we now turn to the question of identifying a means of effectively implementing these rights, so they are actually enjoyed or realized. In short, we turn to the task of ascribing legal content to our environmental rights.

If we return to Stone's criteria[56] for "legal" rights, it can be recalled that we require:

1. The ability of the rights-holder to institute action (at his or her behest);
2. A court or some other "public authoritative body" which will review the complaint;
3. Injury to the rights-holder must be taken into account; and
4. Relief must run to the benefit of the rights-holder.

A. *Institution of Legal Action*

Having taken the view that environmental rights are "moral" rights, they can be conceived of as a birthright — rights possessed by virtue of being human.[57] Since they are not rights created or granted by the state — like the right to vote or property rights — we do not need laws to "create" the rights,[58] although we might need laws to ensure that others respect them. Thus, as with the right to life, the primary role of the state and its institutions is, arguably, to safeguard a natural "given": protecting the continued flow of environmental quality.[59]

In addition, as with any other rights (in the sense of entitlements), environmental rights are claims *to* something *from* someone.[60] In other words, the claim is a claim made *against other humans* — not a claim to nature or natural resources.[61] Like any other human rights they are claims upon society and other persons if those others jeopardize environmental quality.[62]

---

[56] *Stone, supra* note 5 and accompanying text. For convenience, we have adopted Stone's model in answer to the question of "how one should make environmental rights legally enforceable." This model is not, of course, beyond debate– for example, some would argue that rights should be protected in the Constitution: see *Gibson, supra* note 16.

[57] *N. Gibson, supra* note 27 at 16; and *Rolston, supra* note 28 at 260-61.

[58] *Rolston, ibid.* at 260-61.

[59] *Ibid., Robertson, supra* note 34 at 451.

[60] *Rolston, supra* note 28 at 254.

[61] *Ibid.* at 260-61.

[62] *Ibid.* at 262. See also *Leary, supra* note 8 at 483.

Also, since we are proceeding on the view that the existence of rights produces justified constraints on how others may treat the rights-holder, there are correlative duties or obligations or constraints imposed upon others.[63] Since the correlative of rights is responsibility, if we have these rights we also have the responsibility to respect those rights in others and must be prepared for constraints on our own conduct.[64] So there is a notion of duty or responsibility, in addition to the notion of entitlement.

Thus, to secure the enforceability of environmental rights, a mechanism must be created in law to provide rights-holders with standing and a cause of action (judicial or administrative) in at least two circumstances:

1. If any person's positive act or failure of a prescribed duty directly infringes environmental rights (which we might describe as a right to impose liability or seek enforcement); and
2. If government fails to establish adequate safeguards to protect the continued flow of the necessary environmental quality (which might be described as a right to compel government to meet a requisite standard of decision-making, including standard setting).

Such actions would meet Stone's criterion of being "at the behest" of the rights-holder.

However, it is worth noting that most existing Canadian decision-making and standard-setting on environmental matters is a discretionary matter for legislative and executive bodies. Thus, the second of these two matters, in environmental law, is largely seen as an accepted part of government's right to intervene on behalf of its citizens to protect human health and welfare. Apart from limited "public participation" consultation during decision-making processes, there is no role for affected citizens.

In addition, government commonly assumes responsibility for the first of these categories as well *i.e.*, it not only prescribes acceptable standards of conduct, but also takes responsibility for enforcement of those standards. This is so even where the government itself is the rights-violator.

Thus, Canadian environmental law has largely assigned to government the role of "protector" of environmental rights, rather than assigning enforcement capabilities to the individual rights-holders. This, arguably, may even be warranted as an efficient mechanism to protect collective rights or as a means to ensure "equal protection" of all citizens' rights. However, it leaves individual rights-holders without any mechanism to commence action at their own instance.

Nor do persons, individually or collectively, have the ability to compel government to act on their behalf. This might not be so critical if there were an effective means in law to hold government accountable for failures of enforcement and decision-making, but such mechanisms are also lacking.

Thus, it is clear that an environmental bill of rights will need to create a cause of action that can be brought against others who damage natural processes in any way that impairs the continued flow of environmental quality at a level that will support present and future persons' individual and collective environmental rights. There are two possible conceptions:

---

[63] *Swaigen & Woods, supra* note 7 at 203 and *Rolston, supra* note 28 at 254.

[64] *Rolston, ibid.* at 263.

1. A "strong" rights model which would allow rights-holders to bring such claims on their own initiative; or
2. A "weak" rights model that ascribes authority to government to bring such claims on citizens' behalf and in which individual's rights are translated into a mechanism to hold government accountable if it fails to do so.

Either model would require new legislation[65] to be adopted to be fully effective in Canadian law.

B. *Review by a Public Authoritative Body*

Stone's second criterion for ascribing legal enforceability to rights is that some "public authoritative body" be prepared to review the complaint. The review body could be a court or an administrative mechanism could be contemplated (*e.g.* a tribunal, ombudsman or the like). Key elements would be the independence of the review body, and its ability to hold government accountable, particularly if a "weak" rights model is adopted.

Given the current workings of environmental law in Canada described above, in which governments act as decision-makers, standard-setters and, usually, enforcers of environmental quality parameters, a critical debate "related to the appropriate roles of political and judicial forms of accountability"[66] has occurred when environmental Bills of Rights have been considered.

Those who favour "political accountability" models see judicial intervention in government decision-making as undemocratic.[67] They point out that, unlike the situation in the U.S., our legislature does not need to enlist the aid of the courts to force the executive to implement its legislation; instead our responsible government system means that the executive normally enjoys the majority support of the legislature.[68] Since the legislative and executive branches of government can be "held accountable at the ballot box and in other democratic ways"[69] — and the courts cannot — political methods of accountability are seen as preferable. Judicial conservatism, the narrow legalistic way in which courts must view issues and the limits on their ability to consider a broad range of social policy considerations as relevant to a dispute[70] are also seen as reasons to prefer a "political accountability" model. In short, the courts are non-democratic and inappropriate policy decision-makers.

Proponents of "judicial accountability," on the other hand, take the view that "political accountability does not justify the government monopoly of the right to defend

---

[65] Setting aside for the moment the question of whether existing environmental bill of rights legislation achieves this goal.

[66] M. Winfield, G. Ford & G. Crann, *Achieving the Holy Grail? A Legal and Political Anclysis of Ontario's Environmental Bill of Rights* (Toronto: C.I.E.L.A.P., 1995) at 6 [hereinafter *Winfield*].

[67] *Ibid.* at 8.

[68] *Ibid.* at 7.

[69] *Ibid.*, quoting Thomas McMillan, then Federal Minister of the Environment.

[70] See also *Environmental Law & Policy, supra* note 11, at c. 3 and c. 11.

the environment,"[71] nor eliminate the need for access to judicial review when governments' own action or inaction is the subject of the complaint.[72] They point out that the traditional methods of holding government politically accountable are often weak or ineffective.[73] In a post-Charter era there is a clear and well-defined role for courts to act as defenders of rights when government misconduct is at issue,[74] just as there is a traditional role for courts as defenders of rights when private parties are at fault. In short, courts have a legitimate role as an overseer of government with a mandate to ensure fairness and impartiality and to prevent abuses of government authority.[75] Courts themselves are held accountable by the existence of appeal processes.

Under a "strong rights" model such a debate has, in our contention, little obvious merit. If an *individual* rights-holder is to have an effective review of his or her specific complaint, at his or her "own behest," accountability "at the ballot box" cannot succeed. Even with the assistance of lobbying, media embarrassment, ombudsman-style administrative mechanisms and other "democratic" methods of seeking political accountability, review of any individual complaint might well be, at best, *ad hoc*, biased or inconsistent. In non-democratic countries, especially those under military regimes, the situation is even worse, as environmental standards may be non-existent, notwithstanding the presence of "imported" environmental laws.[76] Environmental regulatory agencies in such countries often function to serve the interest of the regulated industries, rather than to ensure environmental protection.[77] Thus access to judicial review of the offender's conduct is, in our view, required.[78]

This is not to suggest, of course, that courts are perfect social-policy decision-makers. For example, an expert tribunal or other specialized decision-making entity might prove to be less bound by procedural and technical rules.[79] Nevertheless, as the debate in Canada has focussed on a "judicial vs. political" choice, and existing enactments have selected between courts and political mechanisms, we have (as they have) set aside for now the relative merits of using some type of "public authoritative body" other than the courts.

---

[71] W. Andrews, "The Environment and the Canadian Charter of Rights and Freedoms" in *Duple*, *supra* note 16 at 270.

[72] *Ibid.*

[73] *Winfield*, *supra* note 66 at 8.

[74] *Ibid.*

[75] *Trial*, *supra* note 1 at 803; *Hughes*, *supra* note 11 at 434.

[76] The term "imported" is used to connote laws from other countries – mostly from the developed world – which are enacted verbatim, but not enforced. See *Iyalomhe*, *supra*, note 52.

[77] *Ibid.* at 15-19.

[78] Unfortunately, in non-democratic countries, activism and independence are rare features in the judicial system, which may limit the efficacy of the "judicial accountability" model: *ibid.*

[79] Some of the shortcomings of court proceedings in the environmental arena are discussed *infra* note 87 and accompanying text.

C. *Injury to the Rights-Holder is Recognized and Relief Runs to His or Her Benefit*

The final aspects of legal enforceability of rights are that injury to the rights-holder must be taken into account by the review body, and a remedy must be available which runs to that person's benefit.[80]

It should be clear by now that we are not conceptualizing environmental rights in such a way that personal injury or injury to a complainant's property is necessary to trigger a cause of action. Thus, we have moved beyond law and economics arguments that suggest tort and other private law actions would be sufficient to achieve environmental protection. Instead, we have defined environmental rights in such a way that complainants should be able to bring a claim for any act or omission[81] which degrades the present level of environmental quality, impairs essential biological processes or ecosystem function, undermines collective or individual human health or survival, impairs the supply of basic resources, denies fair access to such resources, or undermines the ability of the environment to support human culture.

This cause of action would seem to be extremely broad, and raises predictable concerns about flooding the courts with frivolous claims. Several factors mitigate this concern. First, the cost of judicial proceedings is a barrier;[82] indeed it can form such a barrier to the equal protection of environmental rights that many authors have explored the need for special costs rules and intervenor funding provisions in environmental law.[83] Second, the U.S. experience with environmental bills of rights suggest no "flood" of litigation will occur.[84] Third, the courts have the inherent jurisdiction to control abuses of their processes and to dismiss frivolous or vexatious claims.[85] Finally, our model is predicated on the need to found decisions on the best scientific advice presently available,[86] which implies that frivolous or speculative claims would not succeed.

However, the latter point raises particular concerns. Evidentiary rules often mean that, in the presence of any scientific uncertainty, the "benefit of the doubt" is often given to the status quo, as the claimant cannot prove to the requisite civil or criminal

---

[80] *Stone*, *supra* note 5 at 458.

[81] Including failure by the government to fulfill its obligation: see *infra*.

[82] *Winfield*, *supra* note 66 at 45.

[83] See C. Tollefson, "Public Participation and Judicial Review" in *Environmental Law & Policy*, *supra* note 11, c.7.; C. Tollefson, "When the Public Interest Loses: The Liability of Public Interest Litigants for Adverse Costs Awards" (1995) 29 UBC L.R. 303; C. McCool, "Costs in Public Interest Litigation: A Comment on Professor Tollefson's Article, 'When the Public Interest Loses: The Liability of Public Interest Litigants for Adverse Costs Awards'" (1996) 30 UBC L.R. 309; *Winfield*, *ibid.* at 51.

[84] *Winfield*, *ibid.* at 51. It is perhaps trite to note that this chilling effect is largely felt by individuals and small community groups, and is less of a concern to large multinational corporations and industries that create large-scale pollution and resource disruption.

[85] *Abitibi Paper Co.* v. *R.* (1979), 24 O.R. (2d) 742 at 751, 99 D.L.R. (3d) 333 (C.A.); *R.* v. *Jewitt*, [1985] 2 SCR 128 at 131, 34 C.R. (3d) 193; *R.* v. *Mack*, [1988] 2 S.C.R. 903, 44 C.C.C. (3d) 513.

[86] See above, at 8-9.

standard that the activity complained of has injured environmental quality.[87] In addition, the nature of environmental harm is such that often a series of small incidents, none of which does visible harm or "actual damage," results in a cumulative adverse impact; each actor is equally culpable, although the individual acts may, in isolation, seem *de minimus*.[88] Proof of fault and causation is thus also problematic.[89]

Clearly, such concerns must be addressed as environmental rights are translated into law, particularly if courts are our chosen decision-makers. Numerous proposals to address such concerns have been explored in the environmental literature, including reverse onus provisions, probabilistic causation rules and market-share liability provisions.[90] While it is beyond the scope of this paper to review these issues in detail, some observations about the way in which existing environmental Bills of Rights attempt to address such concerns will be made below.

In addition to an action where environmental rights are directly injured, we have also suggested that claimants have standing where government fails to establish adequate protective standards.[91] In other words, government failure to establish adequate environmental safeguards or make environmentally-sound decisions is seen as a specific type of act or omission which can lead to injury to environmental quality. Thus, judicial review of government standard-setting processes is also contemplated, which raises some additional concerns.

Is the proper role of the state to be a "respecter" of environmental rights alone, or is there a positive obligation to be a "protector" of such rights, or even a "provider" of environmental rights?[92] In a classic "negative rights" situation, all that is expected of government is non-interference with the freedom of persons to provide for their own needs,[93] so long as they do so in a way that does not weaken the possibility for others to do the same.[94] Thus, looking at the example of the right to food, the state's role would simply be to refrain from activities or policies which would interfere with citizens' rights to secure adequate supplies of safe food for themselves.

To give an example in relation to environmental rights, a number of years ago environmental activists in the U.S. started growing wildflowers and native plants in their yards, gardening organically without the use of herbicides and pesticides. The state took the view that these individuals were in violation of local by-laws and were creating a nuisance by letting "weeds" grow. A number of people ended up in court to challenge weed ordinances, with considerable success.[95] Striking down such by-laws fits in with our environmental rights model; if people have a right to maintained biological diversity, the state should not interfere with individual efforts to promote or exercise that right.

---

[87] See W. Charles & D. VanderZwaag, "Common Law and Environmental Protection: Legal Realities and Judicial Challenges" [hereinafter *Charles & VanderZwaag*] in *Environmental Law & Policy*, *supra* note 11, c.3; B. Wildsmith, "Of Herbicides and Humankind: Palmer's Common Law Lessons" (1986) 24 Osgoode Hall L.J. 161 at 177.

[88] *R.* v. *United Keno Hill Mines* (1980), 10 C.E.L.R. 43 at 47 (Yuk. Terr. Ct.).

[89] *Charles & VanderZwaag*, *supra* note 87.

[90] *Ibid.*

[91] See above, at 12.

[92] *Eide*, *supra* note 9 at 464.

[93] *Ibid.*

[94] *Robertson*, *supra* note 34 at 453-54.

[95] *Organic Gardening*, September 1980 at 68.

However, as we have previously noted,[96] the Canadian government has already assumed a role in actively *protecting* our environmental quality and counteracting or preventing activities or processes that negatively affect environmental security. In the area of food security, for example, if someone attempted to dump radioactive waste on agricultural land, the government is clearly seen to have an obligation to prevent infringement of the right to clean, safe food and the need to protect environmental quality.[97] Likewise, the right to food in the developing world should include access to viable land, free from pollution in whatever form.

Note here that the role of the state is not to provide for fulfilment of the right, but rather to protect persons' enjoyment of their rights from infringement by others. Although this is a somewhat more controversial role for government, as it is a "positive" duty, it is simply asking government to ensure that other, more powerful persons don't trample on citizens' rights, so that equal enjoyment of the right remains possible. It is asking government to do what is arguably its primary role, namely to protect the continued flow of environmental quality and to ensure that these universally held rights are universally enjoyed. Thus, this theoretically controversial role of government is in fact widely accepted in Canada in all public health and safety issues and the general public not only approves of government efforts, through pollution control legislation, to protect against problems such as toxic contamination, but generally indicates a desire for *more* of this sort of protection.[98]

A final role which a state might assume is to actually act as a provider of environmental rights, either to assist those who are presently being denied their rights, or to provide the right where no other mechanism exists.[99] For example, intervenor funding might be established to provide an otherwise unavailable opportunity for the poor to challenge infringements of their environmental rights by others, or a government clean-up to mitigate harm after a nuclear meltdown might be needed to provide directly for environmental security. However, this active role for the state is generally seen as a "last resort" or emergency role.[100]

Pragmatically, one would expect that in the area of environmental rights one would encounter a range of state obligations, where the government normally respects, frequently protects, and occasionally provides for citizens' rights. In a country such as Canada, this is no different than its behaviour in relation to other civil rights.[101] In the developing world, at least for some states, this would require governments to extend the frontiers of their laws to incorporate a broader range of protections of human health and the environment. Yet, in its simplest form, all that is required in environmental rights

---

[96] See above at 12.

[97] *Eide, supra* note 9 at 464; *Robertson, supra* note 34 at 453-53.

[98] *Standing Committee Report, supra* note 4 at para. 29.

[99] *Eide, supra* note 9 at 465; *Robertson, supra* note 34 at 453-54.

[100] *Ibid.*

[101] For example, under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, the state is required to *respect* individuals' security of the person. But, if someone is assaulted, the state also has a mechanism to *protect* that person's rights via the criminal law: a complaint can be made, police can investigate and redress can be sought in the courts. In rare cases, for example witness protection, the state might even *provide* for a citizen's security of the person. See also: *Robertson, supra* note 34 at 454.

legislation is a process to challenge government failings in this area and a suitable remedy, when state action or omission leads to a rights infringement.

In addition, for both of our "causes of action"—against those who injure environmental rights directly and against government failures in decision-making—the nature of the available remedy will be critical.

The key here is that, when possible, the available remedy should act to "undo" any deterioration in critical ecological functions or biological support systems. Even if it is not possible to remedy the harm, further damage or deterioration must be prevented. Additionally, fair access to resources must be secured.

Damages are a common civil remedy. It has been suggested that damages *not* be available as a remedy for infringements of environmental rights, as this would remove any financial incentive to bring a "flood" of litigation,[102] and persons with personal injury or property damage can pursue tort actions. More importantly, damages do nothing to remedy the actual environmental deterioration that causes the harm. On the other hand, it is unclear why a complainant should have to bring two proceedings, one to receive injury-compensation and the other to prevent deterioration of environmental quality. In our view, there should be some procedural mechanism for such claims to be tried together.

Administrative remedies and specialized court orders would seem to be more desirable remedies to provide, as they have the greatest potential to ensure the restoration of environmental quality and to prevent future deterioration. Injunctions are an obvious choice, as is *mandamus* when judicial review of government activities is contemplated. Various court orders, as are common in regulatory statutes,[103] could also be made available, such as restoration or reclamation plans, prohibitions on conduct and orders requiring mandatory activities to take place. Where correction of the harm done is not biologically possible, "substitute" remediation of some other local problem could take place.[104] Back-up enforcement measures should also be included to ensure such court orders are complied with.

Of particular concern is the question of how to ensure all persons obtain their "fair share" of environmental quality *i.e.*, what remedy is available to secure distributive justice? Given the need for government intervention which seems needed to secure such a distribution (as protector or supplier of the right),[105] will the state not gain too much power?

The key to answering this concern lies in the need to base decisions on sound science and the minimum threshold levels of environmental quality which it identifies.[106] Distributive justice does not require that all persons have identical shares of clean natural resources and other environmental amenities, rather, it seeks to ensure "fair" shares. It requires us to ensure that no one in our society falls below the "minimum threshold level" needed for the realization of their rights,[107] even though one expects that some people will end up with more environmental amenities than others. Also, it

---

[102] *Winfield, supra* note 66 at 51.

[103] See, *e.g.*, *Canadian Environmental Protection Act*, R.S.C. 1985 (4th Supp.), c.16, s. 130.

[104] *Canada (Environment)* v. *Canada (Public Works)*, (1992) 10 C.E.L.R. (NS) 135.

[105] See above, 12.

[106] See above, 8-9.

[107] *Eide, supra* note 9 at 466-70.

requires us to ensure that disparities in environmental quality do not disproportionately accrue to the further disadvantage of already disadvantaged groups.[108] Thus, for example, while we might not be able to achieve exactly equal levels of air quality for all persons in Canada, we should not accept a system which would permit a percentage of our populace to breathe air so toxic that it causes permanent brain damage.[109] Such a breach of environmental rights should be actionable and the law should be broad enough to permit an appropriate remedy to be fashioned to remove the source of damage.

V. THE CANADIAN APPROACH

We turn now to the question of how well the existing Canadian Environmental Bill of Rights (EBR) fulfill our notions of legally protecting the substantive environmental rights which we would ascribe. For this discussion, we will draw on two examples: the *Yukon Environment Act*[110] and the *Ontario Environmental Bill of Rights*.[111]

A. *The Yukon Environment Act*

Part I of the *Yukon Environment Act*[112] contains an Environmental Bill of Rights (EBR), which declares at the outset (section 6) that "the people of the Yukon have the right to a healthful natural environment." However, there is no cause of action nor remedy for a breach of section 6. Instead, section 8 of the *Act* sets out the more narrow available legal recourse: adult residents of the Yukon have the right to commence a court action if they have reasonable grounds to believe "a person has impaired or is likely to impair the natural environment."[113] The territorial government can be either a complainant[114] or defendant[115] in such an action. Neither personal injury nor property damage to the complainant is required.[116]

"Impairment" is not defined in the legislation, but the "natural environment" is defined as "(a) the air, land and water; (b) all organic and inorganic matter and living organisms, including biodiversity within and among species; (c) the ecosystem and ecological relationships;" and "includes the [associated] cultural and aesthetic values."[117] The *Act* also notes that it *shall* be interpreted and applied to give effect to, *inter alia*, the principle that "all persons should be responsible for the consequences to the environment of their actions,"[118] and the objective of ensuring the "maintenance of

---

[108] R. Godsil, "Remedying Environmental Racism" (1991) 90 Michigan L. Rev. 394; Symposium: "Race, Class and Environmental Regulation" (1992) 63 U. of Colorado L. Rev. 839.

[109] This was the primary reason for the federal ban on leaded gasoline; Gasoline Regulations SOR/90-247 as amended SOR/92-587, SOR/94-355 and SOR/97-147.

[110] *Environmental Act, supra* note 23, Part I.

[111] *Environmental Bill of Rights, 1993, supra* note 25.

[112] *Environmental Act, supra* note 23.

[113] *Ibid.* at s. 8(1)(a). According to section 19, private prosecutions of polluting conduct may also be instituted if that conduct contravenes an existing law.

[114] *Ibid.* at ss. 8(4) and s.13.

[115] *Ibid.* at s. 4.

[116] *Ibid.* at s. 10.

[117] *Ibid.* at s. 2, "natural environment" and "environment" definitions.

[118] *Ibid.* at ss. 5(2)(e) and 5(3).

essential ecological processes and the preservation of biological diversity."[119]

Available remedies are set out in section 12 of the *Act*, and include declarations, injunctions, damages, costs and a variety of specialized court orders, including: requiring the establishment of monitoring and reporting systems; environmental restoration (or funds for that purpose); preventative measures; cancellation of permits; environmental impact assessments; performance bonds; and planning measures.[120] Where damages are awarded, they are paid into a governmental account for rehabilitation or improvement of the natural environment.[121]

Prima facie, this portion of the *Yukon Act* provides very good protection of environmental rights. It is directed toward protecting essential biological processes and associated cultural amenities. It is available at the behest of any adult resident citizen. Although the nature of the "impairment" which triggers the action is ill-defined, it is open to the complainant to introduce sound scientific evidence. In limited circumstances, where the impairment is caused by a "contaminant,"[122] problems with scientific uncertainty and proof of causation are partially ameliorated with a reverse onus provision.[123] Judicial review is available even in advance of the impairment occurring. The remedies available are broad, and are directed toward environmental quality restoration. Apart from distributive justice concerns, one would describe this as a solid effort at an effective EBR.

Unfortunately, the entire scheme is undermined by section 9 of the *Act*, which prescribes the defences available to a rights-violator. In short, where actions are brought against impairing persons, it is a defence that the activity was licenced under any territorial[124] and several major federal[125] statutes, was confined to the polluter's residential property,[126] or that it lacked a feasible and prudent alternative to the activity.[127] The availability of possession of a permit or licence for the activity as a defence converts the section 8 cause of action into an ordinary statutory tort with little difference from those available in most environmental laws.[128] It means that actionable impairment of environmental rights is confined to those cases where government standard-setting has accurately assessed the level at which such rights might be infringed and has licenced only non-infringing activities. Thus, citizens whose rights are being impaired by a licenced activity have no enforceable rights at all, unless there is effective recourse to challenge government standard-setting. A licence to pollute is also a licence to violate environmental rights.

There are three mechanisms set out in the *Act* to challenge various aspects of

---

[119] *Ibid.* at ss. 5(1)(a) and 5(3).

[120] *Ibid.* at s. 12(2).

[121] *Ibid.* at ss. 12(5) - (6).

[122] *Ibid.* S. 2 defines "contaminant" as "a solid, liquid, gas, smoke, odour, heat, sound, vibration, pathogen or radiation ... that is foreign to the normal constituents of the natural environment."

[123] *Ibid.* at s. 11.

[124] *Ibid.* at s. 9(a)(i).

[125] *Ibid.* at s. 9(a)(ii) and sch. B.

[126] *Ibid.* at s. 9(d).

[127] *Ibid.* at s. 9(c). Section 9(2) also establishes a 15 year limitation period from the date a cause of action "arises," without reference to the discoverability of the damage.

[128] See, *e.g.*, *Canadian Environmental Protection Act, supra* note 103, s. 136.

government decision-making: petitioning, complaints and "public trust" actions. Pursuant to section 33 any resident may petition the Minister seeking a change to regulations under the *Act* or other specified statutes.[129] The Minister then makes a discretionary decision whether to put the matter to public review.[130] If the Minister does so, a process for review is established[131] which includes discretionary hearings and intervenor funding.[132] The result is a report to the Commissioner in Executive Council (Cabinet),[133] which makes the final decision. Apart from normal administrative law concerns (e.g. procedural fairness), only rights to notice and to make submissions are guaranteed.[134]

Section 22 of the *Act* sets out the complaint procedure that any person may "complain to the Minister with respect to a decision, recommendation or omission" of any authority exercising power under the *Act,* including discretionary decisions. The Minister then the exercises discretionary powers of investigation and mediation[135] and reports the results to the Yukon Council on the Economy and Environment. The Council can make recommendations and has the power to refer the complaint to Cabinet for a final decision[136] if the complaint is not otherwise resolved. The Minister also reports to the legislature about the outcome of complaints.[137] Again, apart from normal administrative review mechanisms, there is no accountability except that which is political.

The third mechanism to review government (in)action is a "public trust" action. Section 38 of the *Act* establishes the government as the trustee of the public trust, and imposes a statutory duty to protect the natural environment in accordance with the public trust. The "public trust" is defined as the "collective interest of the people of the Yukon in the quality of the natural environment and [its protection] for the benefit of present and future generations."[138] Pursuant to section 8 of the *Act*, every adult resident who has reasonable grounds to believe "the Government of Yukon has failed to meet its responsibilities as trustee of the public trust to protect the natural environment from actual or likely impairment"[139] may commence a Supreme Court action against the state. Ordinary rules about needed certainties of a trust are ameliorated,[140] and the broad range of remedies previously specified are available.[141] Significantly, the section 9 defences are *not* available.

As yet, this portion of the Yukon EBR remains untested, but it clearly has the potential to safeguard and protect environmental rights. While the action can be directed only at government and not private persons, it can be taken at the behest of

---

[129] *Environment Act, supra* note 23, sch. A.
[130] *Ibid.* at s. 33(2) - (4).
[131] *Ibid.* at ss. 30 - 34.
[132] *Ibid.* at s. 36.
[133] *Ibid.* at s. 32.
[134] *Ibid.* at s. 30(2).
[135] *Ibid.* at s. 23.
[136] *Ibid.* at s. 24.
[137] *Ibid.* at s. 26.
[138] *Ibid.* at s. 2.
[139] *Ibid.* at s. 8(1)(b).
[140] *Ibid.* at s. 10(2).
[141] *Ibid.* at s. 12.

rights holders and clearly includes collective and future interests in the protection of environmental quality, which is to be interpreted so as to achieve the objective of maintaining essential ecological processes.[142] The section also liberalizes the concept of standing, since rights-holders are not obliged to show that they are directly affected by an act or omission, above any effect on the general public, before they can institute an action.[143]

Section 14 of the *Act* sets out one other mechanism by which persons might try to protect their environmental rights: any two persons who believe an activity is impairing or is likely to impair the natural environment may request an investigation. The Minister has the discretion to discontinue the investigation if in his or her opinion no "material impairment" has occurred.[144] It is up to the Minister to "resolve" the matter. Although such a right to request an investigation of environmental misconduct is a useful addition to environmental legislation, by allowing citizens some latitude to prod regulatory authorities into action where enforcement is seen to be lax, this discretionary administrative procedure clearly falls short of our model for protecting environmental rights.

To summarize, the only aspect of the Yukon EBR that has real potential to protect substantive environmental rights is the section 8(1)(b) public trust action, which permits citizens access to judicial review of government failings and a range of adequate remedies. As far as having any rights to obtain a remedy against those who directly violate environmental rights, however, the Yukon EBR is very limited. The available statutory tort remedy does permit actions to be taken to protect the environment *per se*, making it broader than some other environmental legislation,[145] but even unlicensed pollution can be justified where there is "no feasible or prudent alternative,"[146] and all licenced harm is not subject to judicial review. Other procedures, namely, complaints, investigations and petitions are largely subject to political control and the possibility of judicial intervention is no greater than in any other environmental statute. In short, only the Yukon public trust action holds potential as a "strong" rights model.

B. *Ontario Environmental Bill of Rights*

The Ontario EBR[147] is a complex statute designed primarily to increase citizen input into the governmental administrative decision-making processes; the idea is to pre-empt government failures, by involving citizens at the outset. The government is explicitly given "the primary responsibility" for achieving the "protection, conservation and restoration of the natural environment for the benefit of present and future generations."[148] Thus, although the stated goals of the legislation include the protection of environmental integrity of "the right to a healthful environment, and of ecological

---

[142] *Ibid.* at ss. 5(1)(a) and 5(3).

[143] *Ibid.* at s. 10.

[144] *Ibid.* at s. 16(2).

[145] See, *e.g.*, *Alberta Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3, s. 207, which requires personal injury or property damage.

[146] *Environment Act*, *supra* note 23, s. 9(1)(c).

[147] *Environmental Bill of Rights 1993*, *supra* note 25.

[148] *Ibid.* at Preamble.

systems,"[149] the primary mechanisms for enforcing such objectives are directed toward increasing public participation in decision-making and the political accountability of government.[150] Critics have, accordingly, concluded that the "EBR's commitment to the right of Ontarians to a 'healthful environment' is limited to a statement of legislative intent, rather than a substantive and legally enforceable right,"[151] and have noted that the focus of the EBR is largely procedural.[152]

However, Part VI of the *Act* does set out one cause of action by which citizens can, at their own behest, commence judicial proceedings. Pursuant to section 84 of the Ontario EBR, any resident in the province may bring an action against anyone who "has contravened or will imminently contravene an Act, regulation or instrument prescribed where "significant harm to a public resource" has occurred (or will imminently occur).[153] Public resources are defined to include air, water, public land, and associated plants, animals and ecological systems.[154]

Before such an action can be commenced, a claimant must first have exhausted the right under s.74 of the *Act* to have the contravention investigated, and the result of that investigation must have been unreasonable, or unreasonably delayed.[155] The investigation procedure must be instituted by two residents and is made by application to an administrative official known as the Environmental Commissioner,[156] who refers the matter to the Minister responsible for the violated legislation.[157] The Minister has the discretion to abandon frivolous requests or investigations of contraventions that, in his or her opinion, are "not likely to cause harm to the environment."[158] The outcome of the investigation is discretionary.[159]

Assuming the result of the investigation is not reasonable and that a section 84 action can be commenced, there are a number of additional points about the cause of action that are worth noting. Class actions are prohibited,[160] there are no reverse onus provisions,[161] and, although the court has the discretion to dispense with an undertaking by the plaintiff to pay damages,[162] no intervenor funding is available.[163] The Attorney General or the defendant may apply to stay the proceedings if to do so would be in the "public interest" and the court in such an application may consider, *inter alia*, the adequacy of any "government plan" to deal with the issues raised.[164]

It is a defence to a section 84 claim that the defendant was duly diligent in attempting to comply with the infringed legislation, that the defendant had a licence or

---

[149] *Ibid.* at s. 2(1)(2).
[150] *Ibid.* at s. 2(3).
[151] *Winfield, supra* note 66 at 11 and 56.
[152] *Ibid.*
[153] *Environmental Bill of Rights 1993, supra* note 25, s. 84(1).
[154] *Ibid.* at s. 82, "public land" and "public resource"definitions.
[155] *Ibid.* at s. 84(2).
[156] *Ibid.* at s. 74(1).
[157] *Ibid.* at s. 75
[158] *Ibid.* at s. 77(2).
[159] *Ibid.* at s. 80.
[160] *Ibid.* at s. 84(7).
[161] *Ibid.* at s. 84(8).
[162] *Ibid.* at s. 92.
[163] *Winfield, supra* note 66 at 52.
[164] *Environmental Bill of Rights 1993, supra* note 25, s. 90.

statutory authorization, or that the defendant "complied with an interpretation" of the permit that the court considers reasonable.[165] If a claimant actually succeeds in a section 84 action, the available remedies include injunctions, declarations, restoration plans (which are overseen by the court), or other court orders.[166] Damages may not be awarded.[167]

Clearly, the Ontario EBR section 84 statutory tort suffers from the same limitations as the section 8(1)(a) statutory tort under the *Yukon Act*: action against impairment of environmental rights is limited to cases where government standards are exceeded, so protection of any rights that might nevertheless be violated is dependant upon effective recourse to challenge government standard-setting.[168] In fact, the Ontario tort is even narrower, as even unlicensed activities that harm rights can be justified if the defendant is not negligent or acted on a "reasonable" interpretation of what they thought they were licenced to do.

There are several administrative mechanisms in the Ontario EBR legislation designed to challenge the effectiveness of government standard-setting or to provide input into the decision making process.[169] The most significant of these is the procedure for requesting a review of prescribed Acts, policies, regulations or instruments, set out in section 61 of the *Act*. As with requests for investigation (discussed previously), application is made to the Environmental Commissioner who refers the matter to the appropriate Minister.[170] The Minister makes a discretionary decision as to whether a review is warranted in the "public interest."[171] The procedure for the review and its outcome are discretionary.[172] In short, ministries conduct reviews of themselves and the complex procedure seems to offer little advantage over a simple written request to government to review its policies.[173]

In fact, the Ontario EBR may actually disadvantage complainants who wish a review of government failings, due to section 118 of the *Act*. This section is a privative clause which denies access to normal administrative law mechanisms for reviewing government decision-making. Apart from the section 84 statutory tort, citizens' recourse to the courts is precluded (apart from ordinary civil proceedings where personal injury or property damage occurs).[174] The only real "rights" of citizens are rights of notice, opportunities to comment, and the right to have their comments taken into account when government makes its decisions; failure to respect such rights will not invalidate those

---

[165] *Ibid.* at s. 85. There is also a 2 year limitation period pursuant to s. 102.

[166] *Ibid.* at s. 93(1).

[167] *Ibid.* at s. 93(2).

[168] Note that the s. 84 action is limited to contraventions of prescribed Acts, regulations and instruments; even unlicenced contraventions of other statutes are not actionable.

[169] Including: statements of environmental values; input into proposals for policies, Acts, regulations and instruments; instrument classifications and appeals from such classifications; and requests for investigations. See *Winfield, supra* note 66 at 9.

[170] *Environmental Bill of Rights 1993, supra* note 25, ss. 61 and 62.

[171] *Ibid.* at s. 67.

[172] *Ibid.* at ss. 69-71.

[173] *Winfield, supra* note 66 at 36.

[174] In such cases, public nuisance standing rules are ameliorated by s.103 of the *Act*. Also, appeals of instrument classifications are possible under s. 38.

decisions.[175]

Thus, accountability for government failures is primarily political. To enable greater political pressure to be brought to bear, the *Act* establishes the office of the Environmental Commissioner,[176] whose duties include monitoring the statute's implementation and reporting any deficiencies to the Legislature. However, the Environmental Commissioner has few powers and to date, despite the Commissioner's scathing reviews of government inadequacies and reports of blatant violations of the Ontario EBR,[177] it seems that the legislature in receipt of those reports is unmoved.[178]

To summarize, while the Ontario EBR no doubt provides a great deal of public notice and input into government decision-making, it provides very little in the way of a remedy if environmental security is, nevertheless, violated. There is no judicial review of government failings and the statutory tort which permits action directly against rights-violators is, as with the *Yukon Act*, extremely limited. Indeed, given the absence of any equivalent to the Yukon "public trust" action, the Ontario legislation has virtually no potential to fulfill our "strong" rights model.

VI. CONCLUSIONS

In recent years the federal government has been working on redrafting one of its central environmental protection laws: the *Canadian Environmental Protection Act*.[179] Included in the draft Bill[180] are new public participation measures which are being referred to as an environmental bill of rights.[181] If enacted in its current form, CEPA 1998 will provide the first EBR available to all Canadians.

The CEPA 1998 provisions closely parallel the Ontario EBR. Pursuant to section 17, any adult resident of Canada may apply to the Minister for investigation of any offence under the *Act*. The Minister investigates the complaint and has the discretion to discontinue the investigation if in his or her opinion the alleged offence is not substantiated or "does not require further investigation."[182] If the investigation proceeds, the Minister refers the matter to the Attorney General for "any action that the Attorney General may wish to take."[183]

Section 22 of the *Act* provides citizens who have applied for an investigation with a right to bring an "environmental protection action" if the response to the investigation

---

[175] *Winfield, supra* note 66 at 30.

[176] *Environmental Bill of Rights 1993, supra* note 25, Part III.

[177] See Environmental Commissioner of Ontario, *Keep the Doors Open to Better Environmental Decision Making*, 1996 Annual Report (Toronto: E.C.O., 1997) [hereinafter 1996 *E.C.O. Annual Report*].

[178] Environmental Commissioner of Ontario, "Environment Low Priority for Province, Says Environmental Commissioner" (1998), http://www.eco.on.ca/english/newsrele/98apr29.htm (last modified: 29 April 1998).

[179] *Canadian Environmental Protection Act, supra*, note 103.

[180] Its most recent reincarnation at the time of writing is Bill C-32, *Canadian Environmental Protection Act*, 1998, http://199.212.18.79/cgi-bin/folioisa.dll/cepa_e/ (last modified: 20 February 1998).

[181] *Ibid.* at Part 2.

[182] *Ibid.* at s. 21.

[183] *Ibid.* at s. 20.

was unreasonable or unreasonably delayed.[184] The action may be brought against anyone who committed an offence under the *Act* who "caused significant harm to the environment,"[185] unless that person has already been convicted, or is subject to "environmental protection alternative measures."[186] The claimant, if successful, may obtain a declaration, a court order requiring preventive measures or requiring the defendant to refrain from misconduct, negotiated restoration plans or "any other appropriate relief" including costs (but not damages).[187] The burden of proof remains on the plaintiff,[188] undertakings to pay damages may be waived,[189] intervenor standing and costs are discretionary, [190] and the court has the discretion to stay or dismiss the proceedings in the "public interest"[191] taking into account, *inter alia*, the adequacy of any government plan to address the issues raised.[192]

Available defences include: due diligence in complying with the *Act*, authorization under a federal statute or equivalent provincial legislation, officially induced mistake of law and "any other defences."[193]

As with the Ontario EBR and Yukon statutory torts, these provisions of the CEPA 1998 clearly allow citizens some room to seek redress when legislated standards are violated and the conduct constitutes an offence, and protecting environmental rights to some degree particularly when government is failing to enforce its laws. What is lacking is an ability to challenge rights-violating conduct that is licenced or to obtain judicial remedies when the standards themselves are inadequate. Thus, CEPA 1998 also fails to meet the proposed "strong" rights model.[194]

That said, one must be careful not to conclude that Canadian EBR's are entirely without merit. Although (apart from the Yukon public trust action) they are far more restrictive than the model we have proposed, such statutes are nevertheless modest expansions of existing statutory torts: no personal injury nor property damage is needed to obtain standing; the "environment" *per se* can be protected; the remedial orders available are directed toward environmental protection and restoration; and in some cases burden of proof rules and concerns surrounding costs awards have been partially addressed (see Table I).

Several recent developments in Canadian environmental law increase the significance of these modest developments: harmonization initiatives, increased reliance on voluntary codes of compliance, deficit reduction measures and deficient government enforcement activity are all contributing to a perception that government is abdicating

---

[184] *Ibid.* s. 22(1).

[185] *Ibid.* at s. 22(2).

[186] *Ibid.* at s. 25. "Environmental protection alternative measures" are defined in Part 10 of the *Act* and are court-supervised written compliance agreements used in lieu of sentencing for specified offences.

[187] *Ibid.* at ss. 22(3) and 33.

[188] *Ibid.* at s. 29.

[189] *Ibid.* at s. 31.

[190] *Ibid.* at ss. 28 and 38.

[191] *Ibid.* at s. 32.

[192] *Ibid.* at s. 32(2)(c).

[193] *Ibid.* at ss. 30 and 10(3).

[194] *Ibid.* at s. 40: Persons who suffer personal injury or other damage as a result of contraventions of the Act also have a cause of action for compensation under the legislation.

its role as protector of Canadian environmental quality. Thus, a few comments on these developments, and their relation to environmental rights, is in order.

In a recent report to Parliament, the Standing Committee on Environment and Sustainable Development reviewed Environment Canada's enforcement capacity.[195] Its conclusions were dismal, and revealed a number of interrelated concerns. A central problem examined by the Committee was lack of funding.[196] As they noted, Environment Canada has lost about 40% of its budget in recent years,[197] resulting in some cases in a loss of 38% of the "operational capacity" of the department.[198] Essential positions are being left vacant[199] at a time when the regulatory burden is increasing.[200] As a result, only selected (priority) enforcement activities are being undertaken[201] and, when complaints were received from the public, a number of cases were being abandoned without follow-up.[202] In the words of the Committee:

> Given the extremely limited enforcement budgets and the unacceptably low number of enforcement officers which must cope with an ever-increasing workload, it is not surprising that Environment Canada is favouring voluntary approaches and the downloading of federal responsibilities on the provinces and territories.[203]

The "virtual abandonment of the federal regulatory capacity ... in favour of signing voluntary agreements"[204] with the industry was viewed with skepticism by the Committee, which expressed its concern that attempts to achieve compliance voluntarily (rather than coercively) may have gone too far.[205] As has been noted by others,[206] without regulations and a credible threat of enforcement, voluntary measures are generally failures. Indeed, the Committee itself cited studies that showed a 94% compliance rate for industries that were regulated and inspected, versus a 60% compliance rate for sectors that self-monitored voluntary compliance regimes.[207] The primary factor motivating corporate decisions to implement environmental measures is, for 90% of companies, the need for compliance with binding regulations.[208]

The Committee also had a number of concerns about federal-provincial equivalency and administrative agreements, which they described as "doubly troubling in light of the federal government's decision to enter into a larger harmonization

---

[195] *Standing Committee Report, supra* note 3.
[196] *Ibid.* at para. 150.
[197] *Ibid.* at para. 31.
[198] *Ibid.* at para. 32.
[199] *Ibid.* at paras. 35-36.
[200] *Ibid.* at para. 43.
[201] *Ibid.* at para. 47.
[202] *Ibid.* at para. 136.
[203] *Ibid.* at para. 156.
[204] Canadian Environmental Law Association, "Brief to the Committee" (24 February 1998) at 3, as cited *ibid.* at para. 50.
[205] *Standing Committee Report, supra* note 3 at para. 50.
[206] Dianne Saxe, "Voluntary Compliance vs. Enforcement? Why the threat of legal action is important" (1996) Haz. Materials Mgmt. 62.
[207] *Standing Committee Report, supra* note 3 at para. 55.
[208] *Ibid.* at para 56.

agreement covering the entire country.'[209] In particular, they noted that the enforcement record under intergovernmental agreements was "extremely problematic,'[210] citing a number of examples where by agreement provincial governments had assumed authority for management of an environmental issue, but were not taking action.[211] Many provinces have also been engaged in budget-cutting, delegation of environmental responsibilities to municipalities (which in turn lack operational capacity) and reliance on privatization and voluntary measures,[212] and some have withdrawn from their responsibilities under federal-provincial agreements.[213] In the Committee's view, "once one level of government effectively devolves its responsibilities to another, it progressively abandons the field and loses its capacity to operate," a capacity which may be impossible to recoup once budgets, staff and expertise are lost.[214] This also led the Committee to take a dim view of the Harmonization Accord[215] and sub-agreements; their concern is that the Accord will lead to the elimination of an entire level of regulation, with a resulting weakening of environmental protection in Canada.[216]

Clearly, in this climate, any increase in the ability of individual citizens to step in and seek the development of standards, and their enforcement, is an important right. Not only do these trends make existing EBR legislation more significant, but they also clarify why even stronger environmental rights legislation is desirable. When binding regulations are replaced with voluntary codes, when the level of government with the authority to act "downloads" the responsibility to do so, and the department designated to enforce what rules remain lacks the financial and human resources to act, *some* mechanism must be left in place to hold accountable those persons whose actions would degrade environmental quality. Enacting a substantive environmental bill of rights as advocated in this article is, arguably, one such mechanism to promote the fulfilment of environmental obligations, and to help maintain and strengthen our regime of environmental protection in Canada.

---

[209] *Ibid.* at para. 114.

[210] *Ibid.* at para. 109.

[211] *Ibid.* at paras. 110-14.

[212] *1996 E.C.O. Annual Report, supra* note 177.

[213] *Standing Committee Report, supra* note 3 at para. 115.

[214] *Ibid.* at para. 116.

[215] Canadian Council of Ministers of the Environment, "A Canada-wide Accord on Environmental Harmonization," http://www.ccme.ca/ccme/harmonization/accord.html.

[216] *Standing Committee Report, supra* note 3 at para. 122-24. For an elaboration of these concerns, see Standing Committee on Environmental and Sustainable Development, "Harmonization and Environmental Protection: An Analysis of the Harmonization Initiative of the Canadian Council of Ministers of the Environment" (Ottawa: Queen's Printer, December 1997).

TABLE I: SUMMARY OF CANADIAN ENVIRONMENTAL BILL OF RIGHTS

CRITERION / ACT	Individual Right of Action vs. Private Persons	Individual Right to Take Proceedings vs. Government	Judicial Review Available	Environmental Damage *per se* is actionable	Specified Remedies are Directed Toward Environmental Restoration	Distributive Justice Concerns Addressed (eg. Intervenor Funding)	Provisions to Address Scientific Uncertainty (eg. Reverse Onus)	Having a Licence is Not a Defence Where Right is Infringed
Yukon s.8(1)(a) EI action	✓	✓	✓	✓	✓	X	Only for impairment by "contaminants"	X
Yukon s.33 petition	X	✓	X	N/A	X	Discretionary	X	N/A
Yukon s.22 complaint	X	✓	X	N/A	X	X	X	N/A
Yukon s.8(1)(b) public trust	X	✓	✓	✓	✓	X	X	✓
Yukon s.14 investigation	X	✓	X	✓	X	X	X	N/A
Ontario s.84 Public resource action	✓	✓	✓	If it also contravenes a specified statute	✓	X	X	X
Ontario s.74 investigation	X	✓	X	✓	X	X	X	N/A
Ontario s.61 review	X	✓	X	N/A	X	X	X	N/A

CRITERION / ACT	Individual Right of Action vs. Private Persons	Individual Right to Take Proceedings vs. Government	Judicial Review Available	Environ-mental Damage *per se* is actionable	Specified Remedies are Directed Toward Environmental Restoration	Distributive Justice Concerns Addressed (eg. Intervenor Funding)	Provisions to Address Scientific Uncertainty (eg. Reverse Onus)	Having a Licence is Not a Defence Where Right is Infringed
CEPA '98 s.17 investigation	X	✓	X	If it is an offence under the Act	X	X	X	N/A
CEPA '98 s.22 EP action	✓	✓	✓	If it is an offence under the Act	✓	Discretionary	X	X