ANNUAL SURVEY OF CANADIAN LAW
PART 2

ENVIRONMENTAL LAW

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I. THREE PHASES IN THE EVOLUTION OF CANADIAN ENVIRONMENTAL LAW— OR WHERE WE'RE AT**

To some busy practitioners and members of the judiciary the assertion that there exists a specialization of "environmental law" may be either a pleasant surprise or be viewed as an attempt by an elite to render anachronistic a mere knowledge gained in traditional law courses and a general practice.

In light, however, of rather widespread concern about pollution and energy problems (the former being only a symptom of the societal patterns that in part have led to the latter) it is not altogether surprising that even in the legal world there have been some responses.

These developments, commencing about two decades ago in Canada, have evolved through several stages, escalating in the last ten years to a point where they are entering their most sophisticated form, one that has already begun to see many more lawyers and judges thrust into the midst of environmental concerns.

Two areas of activity point to the emergence of the specialty. In the non-legislative context, one can point to, for example, the formation within the Canadian Bar Association in 1971 of an Environmental Law Section; the founding in 1970 of the Canadian Environmental Law Association, a 500-member, non-profit coalition composed of lawyers, scientists, engineers, planners and ordinary citizens dedicated to enforcement of present environmental laws and to their improvement; the decision by the publishers of the *Canadian Encyclopedic Digest* to include for the first time in their new Ontario Edition a section on "Environmental Law";[1] the sponsorship commencing in 1971 of conferences by government environment departments, private research centres, law faculties and even by law society continuing

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[1] The Carswell Co. (Ont.) 3d ed., Vol. 10, scheduled for publication Jan. 1976.

education departments on the relationship of law to scientific, engineering and planning concerns regarding resources development and pollution control (the proceedings of which generally are available);[2] the commencement in 1972 of publication of *Canadian Environmental Law News* (CELN), a six-times-yearly reporter containing decisions of courts and boards in environmental matters, and summaries of new or amended legislation;[3] the commencement, beginning about 1969, of "environmental law" courses in virtually every Canadian law school; the use of "environmental law" categories by the major law report services; the debate and approval of far-reaching resolutions in 1971 and 1973 by the Canadian Bar Association positing the need to ensure public involvement in environmental control matters and for procedural safeguards and adequate legislation in the area;[4] the 1974 publication of a book over 400 pages in length, *Environment on Trial*,[5] concerned solely with Ontario's environmental laws; a heavy annual diet, again commencing about 1970, of articles on the subject in virtually every Canadian law journal[6] together with the preparation of a number of both published and unpublished Canadian legal studies in the area;[7] and perhaps most

[2] See *The Last Bottle of Chianti and a Soft Boiled Egg*, in PROCEEDINGS OF A CONFERENCE ON CANADIAN LAW AND THE ENVIRONMENT (Oct. 1971) (Agassiz Center for Water Studies, University of Manitoba); ASK THE PEOPLE (C. G. Morley ed. 1972), (Proceedings and Papers by various Canadian lawyers, legal scholars, and scientists on Canadian Law and the Environment, Westwater Research Centre, University of British Columbia); *Pollution—Environmental Law*, (May 1972) (Law Society of Upper Canada, Department of Continuing Education, Toronto); *The Environment—Can our Laws Protect It?* (material prepared for the 10th Annual Conference on Law and Contemporary Affairs) (University of Toronto 1973); *Canada's Environment: The Law on Trial*, in PROCEEDINGS OF AN ENVIRONMENTAL LAW CONFERENCE (C. G. Morley ed. April 1973) (Manitoba Institute of Continuing Legal Education and the Agassiz Centre for Water Studies, University of Manitoba).

[3] Published jointly by the Canadian Environmental Law Association (CELA), and the Canadian Environmental Law Research Foundation (CELRF), 1 Spadina Cresc., Toronto M5S 2J5.

[4] *See* text *infra*.

[5] D. ESTRIN & J. SWAIGEN, ENVIRONMENT ON TRIAL—A CITIZEN'S GUIDE TO ONTARIO ENVIRONMENTAL LAW (1974) (published by CELA and CELRF).

[6] *See, e.g.*, Eddy, *Locus Standi and Environmental Control: A Policy for Comparison*, 6 U.B.C.L. REV. 193 (1971); Estey, *Public Nuisance and Standing to Sue*, 10 OSGOODE HALL L.J. 563 (1972); Good, *Anti-Pollution Legislation and its Enforcement: An Empirical Study*, 6 U.B.C.L. REV. 271 (1971); Ianni, *International and Private Actions in Transboundary Pollution*, 11 CAN. YEARBOOK INT. L. 258 (1973); Symposium on *The International Legal Aspects of Pollution*, 21 U. TORONTO L.J. 173 (1971); Landis, *Legal Controls of Pollution in the Great Lakes Basin*, 48 CAN. B. REV. 66 (1970); Lucas, *Legal Techniques for Pollution Control: The Role of the Public*, 6 U.B.C.L. REV. 167 (1971); McLaren, *The Common Law Nuisance Actions and the Environmental Battle—Well-Tempered Swords or Broken Reeds*, 10 OSGOODE HALL L.J. 505 (1972); Thompson, *Legal Responses to Pollution Problems—their Strengths and Weaknesses*, 12 NATURAL RESOURCES JOURNAL 227 (1972); Thompson, *Natural Resources and the Ecosystem: Is Ten Years the Future?* 51 CAN. B. REV. 295 (1973).

[7] Burns, Franson, Matkin & Stutsky, Environmental Abuse and the Canadian Citizen, 1973 (unpublished manuscript in U.B.C. Law Library, Vancouver and CELA Library, Toronto); Franson, Blair & Bozzer, The Legal Framework for Water Quality in the Lower Fraser River of British Columbia, 1973 (in U.B.C. Westwater Research Centre); Morley, The Legal Framework for Public Participation in Canadian Water Management, 1974 (unpublished manuscript in CELA Library). *See also infra* note 63.

significantly the appointment of ad-hoc tribunals with quasi-judicial powers to enquire into the environmental impacts of large-scale public and private projects in various parts of Canada—most of which involved a multitude of lawyers acting on behalf of project proponents, various affected levels of government, land owners, conservationists and native peoples. [8]

It is of course in the governmental area, and particularly in the categories of legislation and administrative arrangements, that the primary activity has taken place. The developments described above are in many ways responses to the plethora of legislative changes in the area of environmental management that have been occuring with increasing frequency especially in the last decade.

Prior to the advent of these recent legislative and administrative activities, there were of course extant in our jurisprudence both statutes and common law principles dealing directly with pollution. The common law principles, most familiarly nuisance, riparian rights, trespass and the doctrine in *Rylands v. Fletcher* [9] have indeed been invoked in environmental contexts from time to time in Canada, often with dramatic results. [10]

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[8] For example: a) The Commission of Inquiry, headed by Dr. O. M. Solandt and established in 1972 by the Ontario Government, was charged to ascertain the environmental impact of, and provide advice on, the best available route for a 500-kilovolt transmission line that Ontario Hydro planned to build through rural lands and over the Niagara Escarpment; the Commission was appointed by (Ont.) Orders-in-Council OC-2053/72, dated June 21, 1974 and OC-2947/72, dated Sept. 13, 1972, pursuant to the provisions of The Public Inquiries Act, Ont. Stat. 1971, c. 49.

b) The 1974 Commission headed by Mr. Justice Hugh Gibson of the Federal Court of Canada was formed to inquire into new facts concerning the federal Department of Transport's plan for a second Toronto airport on rich farmlands in the Pickering area.

c) The Mackenzie Valley Pipeline Inquiry, headed by Mr. Justice T. C. Berger and established March 21, 1974, wherein the Commissioner is charged to conduct an inquiry into the "social, environmental and economic impact of the proposed Mackenzie Valley natural gas pipeline", is operating under a federal Order-in-Council made pursuant to the provisions of the Territorial Lands Act, CAN. REV. STAT. c. T-6, § 19(*h*) (1970).

[9] L.R. 3 H.L. 330, 37 L.J. Ex. 161 (1868).

[10] For examples of dramatic common law relief, *see* Groat v. City of Edmonton, [1928] Sup. Ct. 522, [1928] 3 D.L.R. 725; McKie v. The K.V.P. Co., [1948] Ont. 398, [1948] 3 D.L.R. 201 (High Ct.); Stephens v. Village of Richmond Hill, [1956] Ont. 88, 1 D.L.R.2d 569 (1955). There have been at least three recent Canadian legal articles reviewing the common law and discussing its relevance to present environment concerns: McLaren, *supra* note 6; Elder, *Environmental Protection Through the Common Law*, 12 WESTERN ONT. L. REV. 107 (1973); Anisman, *Water Pollution Control in Ontario*, 5 OTTAWA L. REV. 342 (1972).

Common law rights were and are not always that useful however. As one writer has pointed out, such rights are usually not useful until injury has already occurred and unless a person knows of, or can ascertain, his rights. He must be in a position so that he can identify the person responsible for the injury or damage; so that he can afford the time and money to take the dispute to court; so that, once in court, he can prove a right which the court recognizes and will protect; so that he can prove that the actions of the defendant unlawfully interfered with that right; and so that he can satisfy the court that on the evidence the defendant's, and not another's, activity interfered with his rights: *see* Morley, *supra* note 7, at 24-25.

In a statutory context, for many decades the most blatant effects of pollution could have been caught by the drastic imposition of federal criminal sanctions (for example, the public nuisance, mischief and criminal negligence sections of the Criminal Code).[11] There does not appear to be, however, any reported instance of pollution being the subject of such a charge in Canada (although noise and air contamination were frequently the subject of successful criminal proceedings in public nuisance in England[12] and were also the subject matter of charges under the mischief section of the Canadian Criminal Code[13] laid privately in 1972—such charges being withdrawn before trial).[14]

Other federal legislation was limited to such specific areas of 19th century concern as the prohibition, as early as 1895, in the federal Fisheries Act[15] of the deposit of deleterious substances into streams frequented by fish; the prohibition against dumping of rubbish, slash and other discards created by the logging and pulp and paper industry into navigable waters; and the requirement of federal permission to erect works in, under, through, or across any navigable water in Canada.[16]

At the provincial level, the earliest environmental concerns were directly traceable to the need for safe water supply and sewage treatment systems. Public Health Acts similar to the earliest 1884 Ontario statute[17] were enacted in most provinces. Such legislation provided that, whenever a municipality contemplated the establishment of a public water supply or sewage system, prior approval was needed from a Health Board which had a duty to determine whether the system would meet the sanitary requirements of the inhabitants or be prejudicial to their health. It also made the discharge or deposit of garbage, excreta, manure or filth, and industrial and other wastes dangerous "or liable to become dangerous to health or to become a nuisance or to impair the safety, palatibility, or potability of the water supply" an offence.[18]

Public Health Acts also held the potential for dealing with other forms of pollution that could become health hazards, for example, smoke, fumes and noise—but little emphasis was placed upon these problems compared to the priority given water and sewage.

Municipalities were sometimes given the power to pass anti-pollution by-laws in the 19th and early 20th centuries which, where they existed, usually took the form of anti-littering, anti-noise and public nuisance ordinan-

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[11] CAN. REV. STAT. c. C-34, §§ 387, 171, 176 (1970).

[12] See RUSSELL ON CRIME at 1404-08 (12th ed. J. Turner 1964).

[13] *Supra* note 11, § 387.

[14] See 1 CELN, No. 4, at 11 (1972).

[15] An Act further to Amend the Fisheries Act, Can. Stat. 1895 c. 27, § 1.

[16] The earliest references appear to be An Act for the Better Protection of Navigable Streams and Rivers, Can. Stat. 1873 c. 65, and Navigable Waters' Protection Act, CAN. REV. STAT. c. 115 (1906).

[17] The Public Health Act, Ont. Stat. 1884 c. 38.

[18] *Id.*

ces. More often than not, they were unenforced and sometimes unenforceable. [19]

In a general way, this was the extent of "environmental" law prior to the mid 1950's in Canada. The major exception was in industrialized Ontario, where statutes and orders-in-council, concerned primarily with the mining and smelting industries, were passed to prevent persons suffering from the toxic emissions and effluents of such establishments from obtaining injunctive relief, and which appear to have even circumscribed rights to monetary compensation. Some of these rather blatantly pro-industry measures included:

(a) reservations of doubtful legality contained in Crown patents of lands in the Sudbury area which ran with the land and precluded any owner from suing the proprietors of any mining company for the emissions of noxious fumes passing over the land; [20]

(b) the Industrial and Mining Lands Compensation Act, [21] first passed in 1918, which authorized mine and smelter owners to purchase smoke easements which bound the present and subsequent owners of the land to allow the toxic gases free passage; payment for the grant of such an easement was deemed to be a "complete answer" [22] to the request for an injunction in any subsequent proceedings concerning the emissions;

(c) the Damage by Fumes Arbitration Act, [23] repealed in 1970, [24] which removed the threat of civil action either for damages or injunction from industries engaged in the smelting or roasting of nickel-copper or iron ore or in the treatment of sulphides where the process caused damage to crops, trees, or other vegetation; affected property owners who were either barred from suit by the previously described devices or (in the rare instance where they were not barred) who were unwilling to risk the costs of civil litigation in a contest with industrial giants, were given the ability to ask a government-

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[19] *See, e.g.*, The Municipal Act, ONT. REV. STAT. c. 284, § 354(1) para. 114 (1970), *as amended by* Ont. Stat. 1972 c. 124, § 10; *see also* City of Toronto By-law No. 17302 which was found invalid for uncertainty in the unreported decision of Regina v. Acme Screw and Gear, Feb. 18, 1971 (Ont.).

[20] *See, e.g.*, Crown Patent of Part Lot 9, Concession 6, Township of Dill, District of Sudbury, recorded as Instrument No. 8206 in the Office of Land Titles, Sudbury, Dec. 4, 1957. I am indebted in these remarks on special treatment of air polluters to Toronto lawyer Douglas Lash who, as a law student, together with others working for the Sudbury Environmental Law Association, researched the history of the special benefits that mining companies in the Sudbury area have received from the Ontario Government. A file containing memorandums to the Ontario Cabinet from the then Department of Lands and Forests outlining some of the "justification" for this policy and legislation, SELA's legal research, relevant Orders-in-Council, and correspondence with the Ontario Government concerning these matters, is on file with the CELA library in Toronto.

[21] ONT. REV. STAT. c. 219 (1970).

[22] *Id.*, § 4.

[23] ONT. REV. STAT. c. 86 (1960).

[24] An Act to Repeal The Damage by Fumes Arbitration Act, Ont. Stat. 1970 c. 103.

appointed arbitrator for compensation, the acceptance of which barred any possible civil remedy; and

(d) section 645 of the Mining Act, [25] which can have the effect of depriving riparian owners of their injunction remedy and substituting compensation for injury or damages suffered—as happened where riparian resort owners complained of pollution caused by disposal of radioactive tailings on the property of the defendant mining company. [26]

Such "amendments" to the common law are of course clear indications of how frustrating the assertion of what little environmental rights the common law protected could be against both industry and industry's friends within the government who worshipped profit and industrialization virtually at any cost. The most infamous exhibitions of the "pollution is good" philosophy were the actions of the Ontario Conservative Party in passing legislation directing the courts to consider economic conditions as the governing factor where riparian owners asked for the grant of an injunction in cases involving pulp and paper mills, and the even more blatant K.V.P. Company Limited Act [27] of 1950 which dissolved an injunction issued by the Supreme Court of Ontario (after it was affirmed by both the Court of Appeal and Supreme Court of Canada) which would have protected the applicant fishermen and tourist camp operators by restraining the large American-owned pulp and paper mill from fouling the otherwise pristine and valuable wilderness Spanish river. [28]

The first factor that might be identified as causing the development, from the 1950's forward, of new legal and administrative arrangements for pollution control was indeed this conflict between the assertion by property owners of their common law rights to use their property free of nuisance and the pressures spawned by both industrialization and by urbanization. Urbanization pressures included the need for more centralized planning by both municipal and provincial levels of government, which in turn left less room for the assertion of traditional notions of individual interests. Governments found that they had to act to prevent, in a more comprehensive and uniform manner, the assertion of individual rights so as to guard against the interruption of the planning and execution of public works, which required centralized authority unimpeded by individual claims, if crisis situations, including provision of large sewage and water treatment facilities to accommodate the urbanization pressures, were to be dealt with. The emasculation of common law rights concomitantly meant that the state would now have the responsibility to protect what was rapidly becoming not just the interest of individual property owners but of citizens at large.

A second factor giving rise to the rapid development of environmental law has been motivated by the absolute antithesis to the attitude which al-

[25] ONT. REV. STAT. c. 274 (1970). This provision has been in the Act since at least 1914.

[26] *Re* Faraday Uranium Mines Ltd., [1962] Ont. 503, 32 D.L.R.2d 704.

[27] Ont. Stat. 1950 c. 33.

[28] See Anisman, *supra* note 10, at 373ff.

lowed governments like Ontario's to remove the injunctive remedy from persons subject to various forms of gross pollution: the realization in the late 1960's that the survival of man necessitated a halt in allowing industries and government to treat common resources such as air and water as their private sewers and in allowing non-renewable resources to be exploited to exhaustion. The environmental movement, born of scientists who predicted that man was heading for danger and that other species were imminently near to extinction unless certain attitudes were curbed and altered, had taken hold as one of the strongest social movements ever. As J. A. Kennedy, Q.C., former Chairman of the Ontario Municipal Board, has written:

> Air and water pollution, noise, lack of parks, incompatible land uses—all of these suddenly became major social and economic issues in the late 1960's.
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> Citizens concerned about their neighbourhoods, cottage owners, and long-time conservationists, all of whom had been literally crying in the wilderness about these problems, found they had the support of the public and the news media. Pollution horror stories were featured on the front pages of newspapers and in television specials—about DDT, mercury, phosphates in laundry detergents killing off lakes, and a host of other dangers. Demonstrations were held to stop demolition of historic buildings or the destruction of green space by developers, or cutting off access to lakeshores; and ratepayers protested increasingly before any forum they could find. Public pressure on governments and individual politicians to "clean up pollution" and ensure a "healthful and attractive environment" increased dramatically. [29]

Each of these two factors can be said to have caused different phases of development in environmental management. The first factor, the need for crisis action in providing vital services which concomitantly would stop the most blatant pollution dangers and yet prevent individuals from asserting private rights in conflict with such measures, resulted in what might be called Phase I developments—statutes designed primarily to deal with pollution of specific resources. In Phase I, the brief and heavy-handed strictures of 19th century legislation, where they existed, yielded to legislation which was going to "clean up" the pollution of those media and provide licencing systems to prevent future problems from arising. Given the role of water as man's most used and abused resource, it is not surprising that water resources became the first media for attention in Phase I.

For example, 1956 saw the creation of the Ontario Water Resources Commission under legislation of the same name, [30] primarily to finance and supply water and sewage services to municipalities since a major concern was the existence of critical pressures on water supply and sewage disposal requirements particularly in southwestern Ontario, Canada's most densely populated area. The legislation was repealed in 1957 and replaced by a new statute which broadly expanded the Commission's powers. [31] Some

[29] Kennedy, *Foreword* to ENVIRONMENT ON TRIAL, *supra* note 5, at *xv*.
[30] The Ontario Water Resources Commission Act, 1956, Ont. Stat. 1956 c. 62.
[31] The Ontario Water Resources Commission Act, 1957, Ont. Stat. 1957 c. 88.

sections of the Public Health Act [32] were repealed, and the Commission was given authority over such matters as herbicides, water quantity and quality, as well as power to issue orders to municipalities and industries with respect to the establishment of sewage and water works and pollution generally. As a former O.W.R.C. solicitor has commented, the legislation "transformed the Commission into a water management agency concerned with all aspects of the water part of the natural environment as opposed to a public utility concerned primarily with public health." [33]

At the same time in British Columbia the legislature passed a Pollution Control Act, [34] principally to deal with water problems in the heavily populated and industrialized western portion of that province.

In the 1960's these laws were refined, and similar provisions dealing with water came to be found in the statutes of other provinces. Urbanization and the advent of the commuter increased automobile emissions, and these factors, together with the slow transformation of the Canadian economy —primarily in urban areas—to a quasi-industrialized (if branch plant) economy, led to problems of air pollution and waste disposal of unprecedented proportion. And the latter problems became subjects for legislative attention. [35] During this time certain types and uses of pesticides were exposed as insidious dangers to the public welfare, and they too received specialized legislative attention, at least in some provinces. [36]

Between 1956 and 1970 virtually every province gained two or more environmental acts. One has only to peruse the statute books and provincial gazettes (or such handy but non-official compilations as CIL's *A Digest of Environmental Pollution Legislation in Canada,* [37] or the Corpus publication *Ecolog* [38]) to observe how, during these years, the legislative process increasingly recognized the need for new and better environmental laws. The federal government was also active during this period. Its reaction in Phase I was to strengthen its antiquated water laws by amendment, thus increasing fines, broadening the net of contaminants made illegal and allowing a broader scope for institution of regulations. Examples in-

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[32] ONT. REV. STAT. c. 306, § 5, (1950).

[33] A. BRYANT, AN ANALYSIS OF THE ONTARIO WATER RESOURCES ACT at 5-6 (to be published in 1975 by the Canadian Environmental Law Research Foundation—CELRF); *see also* articles *infra* notes 62 & 63.

[34] B.C. Stat. 1956 c. 36. For a history of B.C. water legislation to 1969 see Lucas, *Water Pollution Control Law in B.C.*, 4 U.B.C.L. REV. 56 (1969).

[35] *See, e.g.*, The Air Pollution Control Act, 1958, Ont. Stat. 1958 c. 2; The Air Pollution Control Act, 1967, Ont. Stat. 1967 c. 2; The Waste Management Act, 1970, Ont. Stat. 1970 c. 44. For a more complete account of the history of air pollution laws in Ontario, see D. ESTRIN, THE LEGAL AND ADMINISTRATIVE MANAGEMENT OF ONTARIO'S AIR RESOURCES 1967-1974 (to be published in 1975 by CELRF); *see also, infra* notes 62 & 63.

[36] *See, e.g.*, The Pesticides Act, 1967, Ont. Stat. 1967 c. 74.

[37] A two-volume soft-cover compilation of excerpts from federal and provincial environmental laws, 1973 (available from Environmental Improvement Business Areas, C.I.L., P.O. Box 10, Montreal).

[38] A two-volume looseleaf compilation of Canadian legislation, regulations and semi-official guidelines (available from Corpus Publishers Services, Toronto).

clude amendments to the Fisheries Act [39] and Canada Shipping Act, [40] the latter gaining a large section dealing exclusively with pollution from vessels and the powers of the federal government to prevent and contain such problems. New regulations, made between 1970 and 1972, dealing with pulp and paper mill effluents, and oil and garbage pollution from vessels illustrate further the federal reaction during this first period of environmental concern, [41] as does the passage of similar water legislation for the northern territories in the form of the Northern Inland Waters Act [42] and the Arctic Waters Pollution Prevention Act. [43]

The federal government during this phase also passed the Canada Water Act [44] and the Clean Air Act [45] which can be seen as an initiative by Ottawa to provide some legal means of dealing with transboundary pollution problems, as well as an attempt to ensure minimum national standards for each of these resources by preventing "pollution havens". And regulations under the Motor Vehicle Safety Act [46] prescribed federal limits for certain types of vehicle air pollutants and noise emissions.

After this first flurry of activity the legislative efforts changed in emphasis. Instead of ad-hoc amendments or new acts aimed at particular problems, a Phase II approach emerged in some jurisdictions: the need to demonstrate a more comprehensive approach to what was being increasingly recognized as a holistic problem of critical importance to man's survival.

In this phase "comprehensive" acts were passed, or environment departments created, to bring a unified administrative approach to the segmented laws of Phase I.

By 1973 virtually every Canadian jurisdiction purported to have Phase II laws or administrations: B.C. has a Pollution Control Branch administering a Pollution Control Act; [47] Alberta has a Department of Environment and Environment Conservation Authority; The Manitoba Clean Environment Commission gives all types of licencing approvals under the Manitoba Clean Environment Act; [48] Ontario and Nova Scotia have their Environmental Protection Acts [49] and Quebec its Environmental Quality Act; [50] Saskatchewan's Department of Environment administers its environmental laws; New Bruns-

[39] CAN. REV. STAT. c. F-14 (1970), *as amended by* CAN. REV. STAT. c. 17 (1st Supp.) (1970).

[40] CAN. REV. STAT. c. S-9 (1970), *as amended by* CAN. REV. STAT. c. 27 (2nd Supp.) (1970).

[41] For a concise summary of these amendments and the scope of regulations made under them, see ENVIRONMENT ON TRIAL, *supra* note 5, at 91-99.

[42] CAN. REV. STAT. c. 28 (1st supp.) (1970).

[43] CAN. REV. STAT. c. 2 (1st supp.) (1970).

[44] CAN. REV. STAT. c. 5 (1st supp.) (1970).

[45] Can. Stat. 1970-71-72 c. 47.

[46] CAN. REV. STAT. c. 26 (1st supp.) (1970); Motor Vehicle Safety Regulations, SOR/70-487, SOR/72-248 and particularly SOR/72-248 (Schedule E).

[47] B.C. Stat. 1967 c. 34.

[48] Man. Stat. 1972 c. 76.

[49] The Environmental Protection Act, 1971, Ont. Stat. 1971 c. 86 and Environmental Protection Act, N.S. Stat. 1973 c. 6.

[50] Que. Stat. 1972 c. 49.

wick has a Clean Environment Act; [51] Newfoundland a Department of Provincial Affairs and Environment Act; [52] Prince Edward Island an Environmental Control Commission which administers an act of the same name; [53] and Environment Canada came into existence in 1971 as the federal government's adminisrative department in charge of Phase I laws. Even the Northwest Territories passed an Environmental Protection Ordinance [54] in 1973.

In some cases, Ontario for example, the Phase II development was little more than a repackaging of old acts, like the Air Pollution Control Act [55] of 1967 and the Waste Management Act, [56] into one statute, the Environmental Protection Act [57] of 1971. The most positive feature of such essentially minor changes was to bring the laws under the administration of a new Department, later Ministry, of Environment. In other cases, such as Quebec's, there had been no Phase I developments. It leaped from antiquated 19th century public health and municipal laws directly into Phase II, setting up an Environment Department and largely copying the Ontario Environmental Protection Act. [58] During this phase attempts were made by certain politicians to persuade their constituents that either the new "comprehensive" legislation or environment department or commission set up during this phase meant that environmental problems were now fully under control. In Ontario's case the Premier even described the Environmental Protection Act [59] as "an environmental bill of rights".

But as some concerned Ontario lawyers and citizens who took the time to carefully scrutinize such developments and statements soon concluded, the Ontario act could be called many things with justification, but to call it a "bill of rights" was an "incredible fantasy". [60]

Indeed the labelling of any legislation in Canada existing up to 1974 as "comprehensive" was, in virtually every case, touting of the worst order. The advent of environmental agencies during this Phase was of course a needed and necessary step. As Professor Joseph Sax of the University of Michigan Law School has commented, environmental administrative agencies are an essential institution to regulate the myriad of daily activities of those whose daily business is the devouring of natural environments for private gain and which require that standards be set, permits be granted and routine rules enforced. [61]

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[51] N.B. Stat. 1973 c. 21.

[52] Nfld. Stat. 1973 No. 39.

[53] The Environmental Control Commission Act, P.E.I. Stat. 1971 c. 33.

[54] N.W.T. Ord. 1973 (3rd) c. 2.

[55] Ont. Stat. 1967 c. 2.

[56] Ont. Stat. 1970 c. 44.

[57] Ont. Stat. 1971 c. 86 *as amended by* The Environmental Protection Amendment Act, 1972, Ont. Stat. 1972 c. 106.

[58] *Id.*

[59] *Id.*

[60] CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION, CRITIQUE ON PROPOSED ONTARIO ENVIRONMENT PROTECTION ACT (BILL 94) (July, 1971).

[61] *Foreword* to J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1971).

However, as knowledgeable observers pointed out, a good number of fundamentally important features were lacking in both the so-called comprehensive laws and in the administrative arrangements in regard to ensuring (i) the efficient abatement of present problems, (ii) comprehensive planning to eliminate future environmental conflicts, and (iii) the adequate protection in law of individual and societal rights to a healthy and attractive environment.

Detailed criticisms of some Canadian jurisdictions' Phase II laws and administrative arrangements have already been articulated;[62] others will be published in 1975.[63] Space does not permit more than a general summary here.

Procedurally, the criticisms include the fact that legal limits establishing maximum permissible pollution levels are set by regulations drafted by civil servants who are not obligated, nor usually inclined, in the absence of statutory requirements, to give prior notice to, or to consult with, members of the public concerning such legal standards.[64] In no jurisdiction is there a legal means of causing a review of such regulatory standards if they were deficient *ab initio* or if new technology renders them obsolete. Amongst the ramifications of this procedure is the fact that, once set, such regulatory standards tend to establish a de facto roadblock when private remedies are invoked, if indeed they do not constitute a de jure limit of where private redress should end. Finally, there is no procedure to ensure that regulations *are* indeed made, and given the form such acts almost uniformly take, the absence of regulations means that the act is of no legal effect.[65]

In order to compel abatement of pre-existing pollution, the agencies are given interesting and perhaps adequate administrative tools, for example, the control orders, stop orders and program approvals found in the Ontario

[62] *See generally*: ENVIRONMENT ON TRIAL, *supra* note 5, Introduction and ch. 1; Lucas, *supra* note 6; Thompson, *supra* note 6; Good, *supra* note 6; Franson & Burns, *Environmental Rights for the Canadian Citizen: A Prescription for Reform*, 12 ALTA. L. REV. 153 (1974); Kenniff & Giroux, *Le droit québecois de la protection et de la qualité de l'environnement*, 15 LES CAHIERS DE DROIT 7 (1974).

[63] Those of which the author is aware are studies of the administration of provincial environmental laws in major Canadian jurisdictions, commissioned by the CELRF (with the support of the Donner Canadian Foundation). The articles are as follows: Franson & Lucas, *Environmental Decision Making in British Columbia*; Elder, *The Participatory Environment in Alberta*; Booy, *Environmental Management and Public Participation in Manitoba*; Bryant, *An Analysis of the Ontario Water Resources Act*; Estrin, *The Legal and Administrative Management of Ontario's Air Resources 1967-1974*; Emond, *A Critical Evaluation of the Environmental Protection Laws in the Maritime Provinces*. *See also* Kenniff & Giroux, *supra* note 62.

[64] Manitoba and Quebec require public hearings in this area, and British Columbia and Alberta have held hearings although they are not mandatory. Prior "public" notice of proposed regulations in Part 1 of the Canada Gazette is required under the Clean Air Act, *supra* note 45, § 21 and under the Motor Vehicle Safety Act, *supra* note 46, § 9. Virtually no other statute requires prior "public" notice of proposed regulations.

[65] For example, three years after the Ontario Environmental Protection Act, *supra* note 49, was passed, there were no noise regulations, although these were being promised regularly every six months; and for nearly two years after the Clean Air Act, *supra* note 45, was passed, no regulations were made prescribing maximum permissible levels of pollutants.

Environmental Protection Act.[66] But whether such devices will be employed is left in the complete discretion of the agency; where they are invoked, no review of their terms is possible except at the instance of the polluter concerned. Others affected by the ongoing pollution, whether industries or residents, are usually given no legal right to have any notice of, or voice in, any procedures that the agency in its discretion determines to invoke to achieve abatement. For example, in Ontario, the reasonableness of the time given for abatement, where the agency determines that it will indeed impose a clean-up order, is not a matter for public knowledge or discussion prior to the issue of the order. Yet such clean-up programs usually render polluters immune from prosecution while the program is in effect.

The procedures for approval of new pollution sources, under most of the Phase II arrangements, are also the subject of criticisms. Again, the general rule is that such applications are handled in a secret process between the applicant and the agency. No notice of the application is given to other industries or residents in the area, nor are they given, even if they are aware of it, any legal right to meaningfully make their views known.[67]

The Canadian Bar Association, at its 1971 annual meeting, took to task this secretive, regulatory approach. It agreed that:

> [T]he deteriorating quality of our physical environment has become, and is a matter of urgent national concern . . . and it is desirable and necessary for the effective operation of pollution control laws in the various provinces of Canada that the participation and cooperation of an informed public in enforcement processes be sought and maintained.

Further, the C.B.A. resolved that:

1. Provision should be made in provincial legislation for effective participation by individuals and groups through public hearings or other appropriate means in proceedings of environmental protection agencies relating to establishment of environmental quality standards and pollution permit terms and to the enforcement of such standards and terms once established.
2. Legislation should be enacted in the various provinces to permit private individuals, with the prior approval of the court, to maintain actions, without joining the Attorney-General and without proving damage different in kind or degree from that suffered by the community at large, for declaratory or other equitable relief against any person, corporation or government agency or department to secure protection of public rights in the healthful quality, recreational use, and freedom from pollution of air, water and land subject to the legislative jurisdiction of the province.
3. Private individuals and groups should, upon request, be accorded access to permits, licences, reports, rules, regulations, technical data and other

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[66] *Supra* note 49.

[67] Some of the factual problems that have arisen under these procedural arrangements are described in Estrin, *Tokenism and Environmental Legislation, in* PROTECTING THE ENVIRONMENT: ISSUES AND CHOICES—CANADIAN PERSPECTIVES 117 (O. Dwivedi ed. 1974).

information relating to the quality of the environment that may be kept on file by any provincial agency responsible for environmental protection or natural resource management.

4. Provision should be made in provincial legislation to allow the provincial pollution control agency to initiate and maintain all forms of proceedings before the courts, including legal proceedings for injunctive or other relief.

5. Provision should be made in provincial legislation for a procedure whereby any person or persons may petition the pollution control agency or the responsible minister to investigate, set standards or take action to enforce the purpose and intent of the pollution control legislation, and the agency or minister shall either act and report to the petitioner or advise the petitioners in writing stating the reasons for denying the petition. [68]

Substantively, the Phase II laws and administrative procedures are criticized for being narrowly focused upon controlling the emission or discharge of contaminants in that there is, in virtually none of the legislation, jurisdiction to clearly make legally possible, let alone require, as a condition of licencing or other prior environmental approval, the examination of the probable or possible consequences (usually described as the environmental impact) of such undertakings as highway corridors, hydro transmission lines, dams, airports or more generally the effects of licencing, for example, industrial activity in a previously natural setting. None of these projects emit contaminants per se, yet their effect on the protection and conservation of the natural environment (the purpose of, for example, the Ontario Environmental Protection Act [69]) may be immensely negative, depending on their location and the degree of conflict with present or anticipated uses of the area.

Further, as a leading Canadian environmental legal scholar, Professor A. R. Lucas, has pointed out:

> Actions having environmental effects are not limited to physical projects, but include policies, proposals for legislation, programs and operational practices. Policies or programs by themselves may have no direct environmental impact, but may, by ordering or re-ordering certain aspects of human conduct or affairs, cause or encourage significant environmental effects; examples are tax or industrial incentives.
>
> Adverse environmental effects are not limited to physically large projects or actions. Apparently insignificant actions, such as a single northern exploratory oil well, can trigger a major pattern of development for the entire region: oil fields, supply centres with attendant population concentration, transportation systems including roads and pipelines, and so on. Actions must not be judged as significant merely on the basis of physical size, but measured against the criteria of actual or potential environmental effects, including cumulative effects. [70]

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[68] Canadian Bar Association, Resolutions passed at the 1971 Annual Meeting.

[69] *Supra* note 49.

[70] Lucas, *Environmental Impact Assessment: Another View* (originally published in the newsletter of the Canadian Arctic Resources Committee, Northern Perspectives, May 1973; republished in 3 NATURE CANADA, No. 1, at 29 (Jan.-March 1974).

The passage in 1969, by the United States Congress, of the National Environmental Policy Act (NEPA) [71] and subsequent developments under it [72] in large part provided the impetus for the examination in Canada of environmental impact assessment as a most useful means of achieving wide scope scrutiny of projects in their earliest planning stages. But the American legislation required only an assessment document properly prepared. Provided this was done, that was the end of the process. It became in the end result nothing more than a game of learning how to properly fill in the blanks. Those who examined NEPA [73] soon concluded that, to make the process more meaningful, there needed to be added a forum or tribunal capable of digesting the information and opinions contained in the assessment document, one that had the power to decide or at least to recommend whether the project should proceed, and if so, upon what conditions.

Those who studied the process in even more depth concluded that, if such a tribunal with adjudicatory functions was to be created, a number of procedural innovations would have to be included to ensure that the assessment process, including the tribunal proceedings, were not going to be merely a rubber stamp for applications. Such safeguards would prevent government manipulation of the tribunal's policy, for example, through a unilateral ability to appoint members sympathetic to government views. It would also ensure equal opportunities for concerned members of the public to meaningfully criticize an assessment document for the preparation of which, a project proponent may have spent three years and five million dollars (as Canadian Gas Arctic Ltd. did in preparation for its Mackenzie Valley gas pipeline application).

A Keynote Resolution passed at the 1973 Canadian Bar Association annual meeting included in a general way the improvements that needed to be made to NEPA style requirements before environmental assessment legislation would be adopted in Canada. The C.B.A. Resolution reflected the input of Canadian legal scholars who had studied the American scene, who had posited the need for an independent tribunal and for public participation and standing provisions in Canadian enactments, and who had had their recommendations accepted privately by an Environment Canada task force. [74]

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[71] Pub. L. No. 91-190; U.S.C. 4321-4347 (1969).

[72] *See generally*: NEPA-Reform in Government Decision Making, United States Council on Environmental Quality 3rd Annual Report (Aug. 1972); F. ANDERSON, NEPA IN THE COURTS (1972); Stein v. City of Winnipeg, [1974] 5 W.W.R. 484, 3 CELN 95 & 141 (Man.), discussed *infra* text.

[73] *Supra* note 71.

[74] The confidential report, Federal Task Force on Environmental Impact Policy and Procedure (Aug. 1972), was never released. Terms of reference were "to develop and recommend the policy and machinery by which the federal government would anticipate and assess the probable impact on the environment of major actions prior to final decisions being made to initiate them." Recommendations are made for a federal policy including: a) Environmental Impact Assessment (EIA) legislation, b) Independent Environmental Review Board to administer the EIA procedure and make recommendations, but not render decisions on proposed actions, c) preliminary and final EIA statements at the planning stage for all federal actions with potential for significant environmental impact, d) responsibility for EIA to rest with the proponent

The C.B.A. Resolution made clear the need for rejecting the Phase II stack-and-sewer-vision context in which environmental licencing and planning had been occurring and reaffirmed the need for public participation in environmental decisions:

> RESOLVED
>
> That the Canadian Bar Association supports public participation in the planning and approval of projects that have a significant environmental impact and in the enforcement of regulations designed to protect the environment and recommends that
>
> (a) every project having a significant environmental impact be preceded by an environmental impact study, paid for by the proponent of the project and that this study and all other information obtained through public funds be made available to the public; and
>
> (b) any individual or groups have the status to object to any such project and that upon such objection, a mandatory public hearing be held before any government approval or licence is granted; and
>
> (c) any individual or groups, with the leave of the court, on his or their own behalf or on behalf of the public, have the status before all courts or administrative tribunals to review such project or enforce any governmental regulations without demonstrating a special interest or damage. [75]

It remained for the Canadian Environmental Law Association's Environmental Impact Team to elaborate on the C.B.A. resolution by articulating the details of substantive measures and procedural safeguards necessary to ensure that the process not only occurred but that it was meaningful. CELA did this in its *Principles for Environmental Impact Assessment*, published in October 1973 and one year later submitted a draft of model Environmental Impact Assessment Legislation and a detailed Commentary on its draft law to the Ontario Ministry of Environment. [76]

From the favourable reaction and public endorsement that CELA has obtained to its October 1973 publication from Ontario municipalities, citizen groups, the Canadian Labour Congress, the Ontario Federation of Agriculture and many other groups, as well as from interested lawyers across the country, it appears reasonable that such "principles", were they enacted, would do as much as a law alone can do to ensure that the maximum benefits are obtained from an environmental impact assessment process.

Legislation which meets the criteria of these principles may be described as Phase III in the evolution of Canadian environmental law. In Phase III we will witness laws that will require an environmental impact assessment

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of the action, e) EIA statements to include alternatives, f) guidelines for EIA to be issued, g) provision for appropriate public participation and information in hearings and reviews of statement, and h) development of a co-ordinating environmental data facility and certain research activities. Apparently the report was rejected by the federal Cabinet.

[75] Canadian Bar Association, Resolutions passed at the 1973 Annual meeting.

[76] Both PRINCIPLES FOR ENVIRONMENTAL IMPACT ASSESSMENT and DRAFT LEGISLATION AND COMMENTARY are available from CELA.

process wherein a demonstrably independent tribunal in an open forum scrutinizes an assessment document and determines whether, or upon what terms, a project, whether public or private, that is likely to have a significant environmental impact, shall proceed. Phase III laws will have, as part of their procedure, statutory safeguards to ensure that both affected and merely concerned members of the public, including public-interest groups such as Pollution Probe or the Sierra Club, have a nearly equalized opportunity—through funding (made available from project proponents or possibly from Legal Aid), early access to information and government officials, early notice of the project, and explicitly granted standing before the tribunal and in subsequent judicial review applications (where taken)— to make as meaningful and knowledgeable a contribution to the process as project proponents are expected to make. No longer will the public interest be the preserve of the project proponent, nor will dissenting voices be expressed in a mere emotional harrangue but rather in a well prepared and presented manner.

While there have been some Canadian legislative efforts beginning about 1971 towards providing for environmental impact assessment, Professor Lucas has correctly shown that their effectiveness is limited by one or more of the following constraints:

> (a) While statutory powers may be adequate, no regulations or rules providing environmental impact assessment have been made by the responsible authority. Thus, the Minister of Transport's approval is required for any work in, over, or under navigable waters. This authority under the *Navigable Waters Protection Act* probably is wide enough to include assessment of environmental impacts—certainly those that relate directly or indirectly to navigation. But this requirement is not imposed by regulation, and there is no indication it is required informally.
>
> (b) A responsible authority has discretion under the legislation whether or not to require environmental impact assessment and so there is no guarantee that assessments *will* be required; and, if they are required, the assessments process normally cannot be subjected to judicial review to ensure that proper procedures are followed. For example, in considering a pipeline application the National Energy Board is empowered to consider, in addition to specified financial and technical matters, any public interest that the Board considers may be affected, and the Board may require an applicant to furnish it with relevant information. These powers can be construed as conferring a discretion to require an environmental impact assessment. But the *National Energy Board Act* itself does not guarantee that this will be done. Affirmative statements have been made by the Board and in the Guidelines, but these lack detail and in any event probably cannot be enforced judicially.
>
> (c) Environmental impact assessment is confined to the narrow ambit of each particular statute. A good example is the Minister's power to require production of plans and specifications and to approve new works under the *Fisheries Act*. Assessment is limited to potential

> impact on fish or fish habitat. A similar power under the *Clean Air Act* is limited to effects on air quality.
>
> (d) No legally enforceable guidelines exist to ensure the adequacy and uniformity of environmental impact assessments. The *Northern Inland Waters Act* enjoins the Water Boards to require an applicant for licence to provide them with "such information and studies as will enable it to evaluate any qualitative and quantitative effects of the proposed use on the water management area." But the regulations limit this information to project plans and specifications, and general information about the area affected and type of waste, if any, generated. [77]

Although Professor Lucas was not discussing provincial laws, it is fair to say that the constraints articulated by him apply equally to all current laws which attempt to provide for environmental assessment (with the exception of the City of Winnipeg Act [78] discussed below) including, for instance, section 8 of Alberta's 1973 Land Surface Conservation and Reclamation Act [79] and Ontario's Pits and Quarries Control Act, 1971. [80]

The City of Winnipeg Act [81] of 1971 appears to be the only current Canadian law which is not limited by Professor Lucas's constraints, becoming thereby worthy of consideration for the Phase III category. Section 653(1) of the Act provides that:

> In addition to the duties and powers delegated to the executive committee by this Act or by council, the committee shall review every proposal for the undertaking by the city of a public work which may significantly affect the quality of the human environment and shall report to the council before such work is recommended to council on,
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> (a) the environmental impact of the proposed work;
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> (b) any adverse environmental effects which cannot be avoided should the work be undertaken; and
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> (c) alternatives to the proposed action. [82]

It is readily apparent that these provisions go no further than the American NEPA, [83] upon which they were undoubtedly based, and at least one of the basic problems that the Canadian Bar Association and CELA's proposals were aimed at overcoming has appeared when a citizen attempted to ensure that its provisions were followed prior to the commencement by the City in 1974 of a tree-spraying program using the chemical methoxychlor: the standing of a citizen to cause the procedures to be followed was directly questioned (standing was finally granted in the landmark *Stein v. City of Winnipeg* [84] decision of the Manitoba Court of Appeal discussed below).

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[77] *Supra* note 70, at 30-31.
[78] Man. Stat. 1971 c. 105.
[79] Alta Stat. 1973 c. 34.
[80] Ont. Stat. 1971 c. 96.
[81] *Supra* note 78.
[82] *Id.*, § 653(1).
[83] *Supra* note 71.
[84] *Supra* note 72.

Moreover, when the City gets used to the legal requirements imposed upon it, and actually undertakes such assessments, there appears to be no procedure for guaranteed equalizers, as suggested by CELA, that would make the process a truly meaningful one; *i.e.*, notice that the executive committee was considering such an assessment, funding for objecting citizens to retain experts to scrutinize the materials, etc. Nevertheless the Winnipeg Act is the most advanced Canadian law to date.

Aside from the several discretionary possibilities and one mandatory requirement for executing environmental impact assessments discussed above, there are at least three other contexts in which such procedures are occurring. One does not involve lawyers, the other two do.

In late 1973 and in the spring of 1974, the federal government announced it would implement an administrative "environmental assessment, review and protection process" under which the Minister of Environment is "to ensure that projects, procedures and activities in which the Government of Canada has an interest are subject to environmental assessment and that the findings of such assessments result in designs and procedures which will protect or enhance the natural environment." [85]

The process favoured by the former Environment Minister, Jack Davis, for a one year trial period, was not one that had been recommended by the Environment Department's own task force on the subject (the report of which had never been officially released). It had called for the implementation of legislation that would guarantee public access to information, permit public participation in hearings and reviews, require consideration of alternatives to proposed projects and establish an independent Environmental Review Board. [86] Rather, the virtually secret process that went into effect in 1974 is being carried out under the non-enforceable authority of administrative directives. Agencies cannot be legally compelled to carry them out, and further, they are subject to the constraints articulated earlier by Professor Lucas, that they are neither enforceable nor reviewable judicially. The federal government's choice of an administrative, in-house system came under criticism from both CELA and the Globe and Mail, among others. CELA pointed out that "administrative procedures are less available to public scrutiny and evaluation, let alone participation, than procedures established by legislation . . . . [they] are simply the government talking to itself—and doing so, far too often, in such a way as to make sure it is not overheard." [87] The Globe and Mail editorially has commented that: "The weakness of the purely bureaucratic approach is that the weight given the various factors in any decision is not known to the public . . . . It would

[85] Interdepartmental Committee on the Environment, A Procedure for Implementation of a Federal Environment Assessment, Review and Protection Process, (autumn 1974) (available through Environment Canada's Environmental Protection service and also through CELA). This document outlined *inter alia* the philosophy of, and procedures for, implementation of the process.

[86] *Supra* note 74.

[87] 2 CELN 133 (1973).

be much better to have provision for effective public participation where questions can be asked and answers demanded." [88]

In a partial response to these criticisms, the Environment Department has stated that, as a policy, most assessment statements (when and if required according to unknown internal criteria) will be available on request for inspection. [89] Whether any changes will be made to the system either as a result of a one year trial period or under the influence of the new Environment Minister is yet unknown.

A second context in which environmental assessments are taking place, and it is one that demonstrates the degree to which lawyers will become increasingly important as Phase III laws are implemented, are the ad-hoc environmental assessment tribunals created by the Ontario and federal governments to deal with politically sensitive issues in their jurisdictions. These include:

(i) the Commission headed by Dr. O. M. Solandt established in 1972 which was charged to ascertain the environmental impact of, and to provide advice on, the best available route for a 500-kilovolt transmission line that Ontario Hydro planned to build through rural lands and over the Niagara Escarpment in southern Ontario—a task that involved reconciling Hydro's plans "for building a power distribution system to meet the growing power requirements of the citizens of Ontario with the objections of conservationists and other concerned citizens to the project . . ."; [90]

(ii) the Commission appointed by the federal cabinet to inquire into "new" facts concerning the Department of Transport's plans for a second Toronto airport on rich farmlands in the Pickering area; [91] and

(iii) the Mackenzie Valley Pipeline Inquiry, headed by Mr. Justice T. C. Berger, established March 21, 1974, wherein the Commissioner is charged to conduct an inquiry into "the social, environmental and economic impact of the proposed Mackenzie Valley natural gas pipeline". [92]

All of these inquiries have had a multitude of lawyers appearing before them, for example on behalf of project proponents, their competitors, opposing or supporting government departments, municipalities, utilities, groups representing farmers, environmentalists and native peoples, as well as on behalf of individuals. In addition, each of these inquiries have commission counsel, and sometimes special and junior counsel.

As this is being written, the Mackenzie Valley Pipeline Inquiry has only commenced its hearings, but preliminary rulings and actions by Commissioner Berger have established precedents that will doubtless be advanced in the future as setting the ground rules for any fair environmental as-

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[88] *Id.* at 134.
[89] *Id.*; *see also, supra* note 85, section IV (14).
[90] *Supra* note 8.
[91] *Id.*
[92] *Id.*

sessment process: his rulings that any person or group who desires to be heard will be given standing; that access to virtually all information either in the hands of the proponent or of government will be assured; [93] and the Commission's initiatives in having substantial funding provided to both native and environmental groups to enable full preparation and presentation of their viewpoints. [94]

The third context in which environmental assessment was being conducted in 1974, which also involved the legal profession, was before regulatory and adjudicative bodies, whereat environmental matters have usually been tangentially relevant, but now have become increasingly important. These include such forums as the National Energy Board, the B.C. Land Commission, the Ontario Energy Board and the Ontario Municipal Board. Increasingly groups concerned with resources and environmental factors are being represented by counsel, and the boards themselves have had to acquire staff expertise to enable them to properly deal with these aspects of the matters before them. [95]

As environmental impact procedures, applicable to all public and private works with potentially significant environmental impacts, become more the rule and less the exception, it may be predicted that the ad-hoc commissions will naturally disappear. They are after all serving an interim role. As Dr. Solandt noted in his interim report, "it is . . . virtually certain that if a complete planning mechanism were working effectively the need for this Commission would not have arisen." [96] And the Mackenzie Valley inquiry may be seen as the precursor of a federal process that would allow a meaningful look at environmental aspects of energy projects outside of, and much prior to, regulatory hearings such as those of the National Energy Board.

Nevertheless the very existence of these ad-hoc tribunals and the increased scope of regulatory proceedings augur well for the continued progressive evolution of Canadian environmental law. The expansion of interests to be

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[93] *See*, 3 CELN 123 (1974).

[94] Native groups in the Northwest Territories were given 400,000 dollars in late 1974 to assist them to prepare for the hearings. The money was to be used for research, hiring of legal counsel and field workers to explain the project to affected communities, and has been provided through the Department of Indian Affairs and Northern Development. Another 200,000 dollars was granted at the same time to environmental groups in order for them to prepare criticisms and original research and to obtain legal counsel. This fund is being administered by the Canadian Arctic Resources Committee, on behalf of the consortium of environmental groups entitled Northern Assessment Group (NAG). The money has come from the Berger Commission and the NAG is accountable to the Commission for it. The amounts were allotted in both cases for the period ending March 31, 1975, the Government's fiscal year end. Additional funding is anticipated if the Inquiry carries on significantly beyond that date.

[95] *See, e.g.*, 3 CELN 26 (1974) (National Energy Board and air pollution considerations); 3 CELN 33 (1974) (Ontario Energy Board and environmental considerations); *Re* Sault Ste. Marie, Dec. 21, 1971, [O.M.B. File Nos. R. 6366 and R. 6530] (noise and other environmental issues, as important factors in determination of a rezoning application, which rezoning was needed to allow new works to control air pollution from Algoma Steel Corporation Ltd.).

[96] THE SOLANDT COMMISSION INTERIM REPORT, Oct. 31, 1972, at 26.

represented in the decision-making process in Phase III bodes well for the employment of the increasing number of lawyers graduating from law schools, and for making the lawyer, in working with citizens and other formerly unrepresented groups, a more socially useful member of society.

At the same time the judiciary has become, and will increasingly continue to be, involved in the progress of environmental law. Constitutional issues arise and remain to be settled (discussed below); judicial review of procedural requirements of assessment procedures will become increasingly frequent, and in the process judges will be thrust into the merits of some environmental issues, as the *Stein* case [97] indicates. And with changes in legal aid and standing, more suits and prosecutions to obtain redress for situations that arose prior to proper planning, or which are not amenable to planning solutions, will occur.

All of this suggests that, for those lawyers and members of the bench who were, prior to reading this survey, unaware of developments in environmental law, its causes and probable future growth, some catching up is in order. These developments have been occuring rapidly in the last 20 years, and there is no reason to suspect that the pace is about to slow down. The Canadian bar and bench must be kept aware, and it is hoped that this introduction and the more detailed exposition below will at least serve to place developments in perspective and help the uninitiated find the proper paths in their research.

II. Canadian Environmental Law in the Courts and Tribunals

Having sketched the evolution of the legislative and non-governmental aspects of Canadian environmental law, we now turn to briefly review developments in the most important areas of environmental law with which Canadian courts are concerned:

A. Constitutional Powers and Problems;

B. Locus Standi; and

C. Judicial Review of Environmental Procedures.

A. *Constitutional Powers and Problems*

1. *Division of Powers*

Like most subject matters of modern concern, the terms "pollution", "environment", and "resources management" do not appear in the British North America Act. As a leading constitutional scholar, Dale Gibson, has put it, when trying to decide on the division of power for these subjects, it becomes a question of filling old bottles with new wine.

There have been a number of articles on the topic, beginning with the

[97] *Supra* note 72; *see also* discussion *infra*, "Judicial Review".

then Professor Bora Laskin's paper for the Resources for Tomorrow Conference of 1961, and increasing in frequency since then virtually exponentially. [98] As Dale Gibson has pointed out, "those who have written are far from unanimous in their conclusions. They all agree that both [the federal and provincial] governments have significant powers to deal with pollution, but their opinions vary greatly as to the relative importance of the federal and provincial roles." [99]

Naturally the disagreement arises from the lack, until 1973, of any judicial pronouncements on the results of the environmental legislative phases. The state of uncertainty has caused most governments to act cautiously in framing their legislation. Perhaps the most conservative approach is reflected in federal legislation, for example, the Canada Water Act, [100] and Environmental Contaminants Bill. [101] Except in cases of urgent national emergency, the acts would compel the federal government to consult with the provinces and obtain their agreement before effective clean-up or planning action is taken or standards are set. The boldest constitutional approach to date is the Manitoba Fishermen's Assistance and Polluters' Liability Act, [102] discussed *infra.*

As a result, however, of two provincial Court of Appeal decisions, [103] it is virtually beyond dispute that provincial governments can deal with pollution, based primarily upon their powers to legislate with regard to property and civil rights.

Manitoba legislation imposing liability in Manitoba for activities outside the province which had polluted Manitoba waters and consequently deprived commercial fishermen of their incomes was challenged on several constitutional grounds in *The Queen in Right of Manitoba v. Interprovincial Co-*

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[98] *See*: Laskin, *Jurisdictional Framework for Water Management, in* BACKGROUND PAPERS FOR THE CANADIAN COUNCIL OF RESOURCE MINISTERS, RESOURCES FOR TOMORROW (1961); G. LAFOREST, NATURAL RESOURCES AND PUBLIC PROPERTY UNDER THE CANADIAN CONSTITUTION (1969); Gibson, *The Constitutional Context of Canadian Water Planning*, 7 ALTA L. REV. 71 (1969); McGrady, *Jurisdiction for Water Resource Development*, 2 MAN. L.J. 219 (1967); Stein, *An Opinion on the Constitutional Validity of the Proposed Canada Water Act*, 28 U. TORONTO FAC. L. REV. 74 (1970); Landis, *supra* note 6; SYSTEMS RESEARCH GROUP, THE ROLE OF CANADIAN CONSTITUTIONAL LAW AS A FRAMEWORK FOR ENVIRONMENTAL POLICY CONTROL (1970); Emond, *The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution*, 10 OSGOODE HALL L.J. 647 (1972); Alhéritière, *Les problèmes constitutionnels de la lutte contre la pollution de l'espace atmosphêrique au Canada*, 50 CAN. B. REV. 561 (1972); Gibson, *Constitutional Jurisdiction over Environmental Management in Canada*, 23 U. TORONTO L.J. 54 (1973).

[99] Gibson, *The Environment and the Constitution, in* PROTECTING THE ENVIRONMENT, *supra* note 67, at 117.

[100] CAN. REV. STAT. c. 5 (1st supp.) (1970).

[101] Bill C-3 of the 29th Parliament of Canada, given first reading at the second session March 4, 1974. This Bill died when Parliament was dissolved for the July, 1974 election, but the speech from the Throne indicated it would be reintroduced in late 1974 or 1975.

[102] Man. Stat. 1970 c. 32.

[103] The Queen v. Interprovincial Co-operatives Ltd., 38 D.L.R.3d 367, 2 CELN 47 (Man. 1973); Regina v. Young, 1 Ont.2d 564, 14 Can. Crim. Cas.2d 202, 42 D.L.R. 3d 622, 2 CELN 111 (1973).

operatives Ltd. [104] In its decision, the Manitoba Court of Appeal upheld the validity of the legislation, finding that it was not invalid on the ground that in constitutes a levy of a tax "not within the province", [105] nor was it held to be in relation to criminal law, being neither penal nor prohibitory. Further, the subject matter was held not to fall within the Dominion power over "seacoast and inland fisheries", [106] as it was not directed towards prohibiting pollution of fish-frequented waters or towards alteration of water quality, as that quality affects fish, but rather it was essentially concerned with the injurious effect of such pollution on the plaintiff's proprietary right of fishery. Chief Justice Freedman said that the pith and substance of the legislation was "the protection of the Province's right of fishery and . . . the regulation of the enforcement of the common law tort of injury to that fishery." [107] Mr. Justice Hall held that the subject matter "relates to property and civil rights in the province and to subjects of a local and private nature." [108]

In *Regina v. Young*, [109] the validity of a municipal anti-noise by-law, enacted under the authority of the Ontario Municipal Act [110] was attacked. In the County Court the charge against the accused had been dismissed on the ground that the by-law, which makes it an offence for any person to "ring bells, blow horns, shout, or make an unusual noise, or noises likely to disturb the inhabitants", [111] "purports to occupy part of the field already occupied by the Criminal Code of Canada section 171." [112]

Section 171 of the Code [113] makes a crime of causing a disturbance in, or near, a public place by, *inter alia*, fighting, screaming, shouting, swearing, singing or using insulting or obscene language.

In brief oral reasons, the Ontario Court of Appeal reversed the County Court judge and upheld the by-law, making it clear that there were grounds for both provincial and federal regulation of the subject:

> No attack is made upon the provisions of [the enabling section of the *Municipal Act*] which clearly was enacted in purported exercise of the powers conferred upon provincial legislatures by s. 92(8), (13), and (16) of the *British North America Act* [municipal institutions, property and civil rights in the province and matters of a merely local or private nature in the province]. It is readily apparent that the by-law under review was designed to provide for the quiet enjoyment of residential property of the inhabitants of the Municipality of the Borough of North York. It is municipal legislation analogous to anti-smoke by-laws and like enactments, the purpose of which is to preserve environmental purity. The fact that the enactment contains a prohibition observance of which is secured by the sanction of a fine does not render it criminal legislation . . . . We have

[104] *Id.*
[105] *Id.* at 372.
[106] *Id.* at 373.
[107] *Id.* at 381.
[108] *Id.* at 400.
[109] *Supra* note 103.
[110] ONT. REV. STAT. c. 284 (1970).
[111] *Supra* note 103, at 565.
[112] *Id.* at 564.
[113] *Supra* note 11.

> concluded that the provincial legislation and the by-law . . . can live together and operate concurrently and to adopt the language of Judson, J., in *O'Grady v. Sparling*, [1960] S.C.R. 804 . . . that the two pieces of legislation differ both in legislative purpose and legal and practical effect. The provincial Act imposes a duty on the citizen which is clearly designed to serve *bona fide* provincial or municipal ends not fully provided for in s. 171 of the *Criminal Code* or conflicting with it in any way. [114]

The *Young* decision came about six months after Mr. Justice O'Driscoll of the Ontario Supreme Court had taken the same approach in the case of *Regina v. Lake Ontario Cement Ltd.* [115]

In the *Lake Ontario* case Mr. Justice O'Driscoll was dealing, by way of stated case, with an appeal from the much publicized decision of Provincial Judge Clendenning [116] who had held ultra vires section 14 of the Ontario Environmental Protection Act, [117] which makes it an offence to "deposit, add, emit or discharge" [118] a contaminant into the natural environment likely, *inter alia*, to impair the quality thereof. Judge Clendenning had held that "[t]he problems relating to the protection of the environment which have become apparent in the last decade are of such magnitude as to constitute both an international concern and a national concern in such sense as to bring such legislation within the jurisdiction of the Parliament of Canada." [119] In holding the Act ultra vires, he substantially, if not wholly, agreed with Joseph Pomerant, counsel for Lake Ontario's co-accused, Triad Truckways Ltd., that the subject matter dealt with by the section is "of such national concern that the peace, order and good government provisions set out in the introductory paragraph of s. 91 [of the B.N.A. Act] override the exclusive provincial jurisdiction and therefore only the Government of Canada can enact legislation in relation to this particular subject matter." [120]

On the appeal before Mr. Justice O'Driscoll, Pomerant again put the case for exclusive federal jurisdiction. He argued that the impugned legislation was a matter of national concern, thus falling under peace, order and good government, and that it was in pith and substance criminal law. The court was referred to the preamble of the Canada Water Act [121] which declares that "pollution of the water resources of Canada is a significant and rapidly increasing threat to the health, well-being and prosperity of the people of Canada and to the quality of the Canadian environment at large and as a result it has become a matter of urgent national concern . . ." [122]

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[114] *Supra* note 103, at 565.

[115] [1973] 2 Ont. 247, 11 Can. Crim. Cas.2d 1, 35 D.L.R.3d 109, 2 CELN 23 (High Ct.).

[116] 10 Can. Crim. Cas.2d 141 (Prov. Ct. 1973).

[117] *Supra* note 57.

[118] *Id.*, § 14.

[119] *Supra* note 116, headnote.

[120] *Id.* at 144.

[121] *Supra* note 44.

[122] *Id.*, preamble.

and to other federal statutes, including the Fisheries Act, [123] Canada Shipping Act, [124] Clean Air Act, [125] etc.

However, Mr. Justice O'Driscoll found that "none of the above-mentioned statutes . . . has been shown to conflict in any way with s. 14 of the Environmental Protection Act, 1971 as of the date of the hearing of this appeal. Counsel for the respondents did not argue or suggest there was any statute of the Parliament of Canada comparable to s. 14 under review." [126] Justice O'Driscoll continued:

> Counsel for the respondent, Triad, [Joseph Pomerant] argued that I should be realistic, strip away the semantics that he alleges have surrounded some judicial decisions on constitutional issues; he argues that I should strike a blow for one-national-equal-efficient environmental policy and enforcement by declaring s. 14 *ultra vires* the Province of Ontario; this, he argues, would pave the way for the Parliament of Canada to deal with the matter efficiently and in an equal manner from sea to sea. [127]

The Court then stated that:

> [I]t is not my duty or right to comment upon the efficacy or efficiency of this particular legislation; my duty is to decide whether or not the Legislature of Ontario had the legislative competence to enact s. 14 . . . . This being a piece of provincial legislation, I have looked to see whether or not it falls within one or more of the heads of s. 92 of the *B.N.A. Act, 1867.*
>
> In my view, the matters dealt with by s. 14 of the *Environmental Protection Act, 1971* are property and civil rights in their origin, local and provincial, and fall within the classes of subject set out in heads 13 and 16 of s. 92 of the *B.N.A. Act, 1867* and do not fall within one of the heads under s. 91 of the *B.N.A. Act, 1867.* [128]

The Court further stated that:

> [T]he "peace, order, and good government of Canada" clause is only to be used to declare a particular statute of the Parliament of Canada *intra vires*; no federal legislation is under review, and I hold that the clause "peace, order, and good government of Canada" is neither applicable nor available in this case whether pollution is or is not presently a matter of "national concern". [129]

A further argument of the companies in this appeal was that section 14 was really criminal law, thus being in conflict with sections 387, 171, 176 of the Criminal Code—the mischief, nuisance and causing a disturbance sections.

However, Mr. Justice O'Driscoll adopted the proposition that a Court will not lightly impute an intention to the legislature to legislate outside its allotted field and found no repugnancy or conflict "between any section of the

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[123] *Supra* note 39.
[124] *Supra* note 40.
[125] *Supra* note 45.
[126] *Supra* note 115, at 253.
[127] *Id.* at 253-54.
[128] *Id.* at 254.
[129] *Id.* at 255.

Criminal Code and s. 14 of the Environmental Protection Act, 1971 which I have found to be legislation dealing with property and civil rights." [130]

The most recent case involving the division of power in an environmental context slides into a middle ground between the foregoing cases.

In *Regina v. Continuous Colour Coat Ltd.*, [131] an Ontario County Court judge did not go so far as to agree that the provinces were without any jurisdiction to make environmental laws. His Honour Judge Ball did rule however that in all fields of pollution occupied by Canada, the provinces had no jurisdiction. He rejected the double aspect theory recognized by the Ontario Supreme Court and Court of Appeal decisions discussed above, holding that only the paramountcy doctrine or the doctrine of the occupied field was appropriate, because:

> [N]owhere in the *British North America Act* is pollution mentioned, and resort must be had to the fact that Parliament has been declared to have exclusive jurisdiction over many matters not specifically mentioned in [that] Act . . . . I think that the Ontario legislation where it is superseded by Federal legislation must fall. [132]

In summary, no judicial doubt seems to exist that for certain purposes each level of government can enact their own legislation but there is no unanimity as to whether the double aspect or paramountcy doctrine is to prevail.

2. *Extra-Territorial Pollution*

As recently as 1973, Dale Gibson believed that provinces, although certainly having powers to deal with pollution, were unable to make laws with extra-provincial effects; in his words, "they can do very little about pollution coming into the province from outside." [133]

However, two Court of Appeal decisions [134] have ruled otherwise, and in one of these cases leave to appeal was refused by the Supreme Court of Canada.

In the case in which leave to appeal was refused, *Town of Peace River v. British Columbia Hydro and Power Authority*, [135] the Appellate Division of the Supreme Court of Alberta refused to set aside an order for service ex juris of the statement of claim in a case based on allegations that interference with the flow of a river in British Columbia, the upstream jurisdiction, caused injury in Alberta, the downstream jurisdiction. The Court held that that action was based upon a tort committed in Alberta such that the order had been properly issued.

The second case, which is on appeal to the Supreme Court of Canada,

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[130] *Id.* at 255-56.

[131] 3 CELN 107 (Ont. County Ct. 1974).

[132] *Id.*

[133] *Supra* note 99, at 118.

[134] Town of Peace River v. British Columbia Hydro and Power Authority, [1972] 5 W.W.R. 351, 29 D.L.R.3d 769 (Alta.); The Queen v. Interprovincial Co-operatives, *supra* note 103.

[135] *Id.*

is *The Queen v. Interprovincial Co-operatives Ltd.* [136] As noted earlier, what was under attack here was some of the boldest environmental legislation yet enacted in Canada. This was a motion to strike out parts of the statement of claim of Manitoba's suit. The defendants ("IPCO" and "Dryden") are both Dominion companies and operators of chlor-alkali plants. The IPCO plant is located in Saskatchewan, close to the South Saskatchewan River, which flows into Manitoba. Similarly, the Dryden plant is located in Ontario, on the Wabigoon River, which flows into Manitoba waters. Mercury is a by-product of both companies' manufacturing processes. This was deposited in the respective rivers and hence flowed into Manitoba waters.

Because of mercury contamination, the Manitoba government, on April 1, 1970, put a stop to commercial fishing on Lake Winnipeg and its tributaries. Shortly afterwards, the Manitoba Legislature passed the Fishermen's Assistance and Polluters' Liability Act. [137] The constitutional validity of this legislation came before the court on this motion.

The Act does a number of things. It sets up a scheme for Manitoba fishermen to assign their rights to sue to the provincial government. It provides for payments to fishermen for losses suffered because of the prohibition of taking fish from the polluted waters. But more important, the legislation defines the situs of the tort and the defenses available in such an action.

The Manitoba government sought both to bring the game into its own backyard and to change the rules of the game.

The Fishermen's Act makes the polluter liable for the financial loss caused, as well as shifting the burden of proof, requiring the polluter to prove the legality of his behaviour. The Act also removes the obvious defenses in such actions. The person suffering financial loss need not have any proprietary interest in the fishery containing the affected fish. A regulatory authority that prohibits the taking of fish because the water is polluted (novus actus interveniens) is removed as a defense. And so is the fact that the water has been, or is being, polluted by other sources, thus taking away the right to add joint tortfeasors. Nor need it "be established that the contaminant affecting the fish derived from the actual volume of contaminant which the defendant discharged or permitted to be discharged from premises occupied by him, provided the deleterious affect on the fish is of a nature consistent with the contaminant of that kind being the total or partial, immediate or mediate cause." [138]

Finally, section 4(2) of the Act provides that "it is not a lawful excuse for the defendant to show that the discharge of the contaminant was permitted by the appropriate regulatory authority having jurisdiction at the place where the discharge occurred if that regulatory authority did not also have

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[136] *Supra* note 103.
[137] *Supra* note 102.
[138] *Id.*, § 4(1)(*d*).

jurisdiction at the place where the contaminant caused damage to the fishery." [139]

Without this provision, the defendants have a possible defense of statutory authority making their activity in their *own* provinces non-tortious. Manitoba attempted to legislate an end-run to avoid this defense and, on a motion to strike out parts of the statement of claim, Mr. Justice Matas, in the Manitoba Queen's Bench, held such a provision ultra vires because it derogates from civil rights that would otherwise be enjoyed outside the province. [140] He stated: "The defendants are faced with the anomalous situation of being brought to litigation in this province by special legislation and of being deprived of their extra-territorial civil rights by that legislation." [141] Nevertheless the Court of Appeal reversed Mr. Justice Matas. [142] Chief Justice Freedman said that the pleadings showed a direct nexus between the discharge of a contaminant outside the province and injury to the plaintiff's fishery within the province, and that the facts were analogous to defamatory radio broadcasts emitted from stations outside a jurisdiction and, in such cases, the tortious act has been held to take place within the jurisdiction where the remarks were heard. [143] He held that, on this motion, (just as in the Alberta case [144]), there need only be an arguable case that the tort occurred in Manitoba, and that case had been established. [145]

He also held that the pith and substance of the legislation was the protection of the province's right of fishery; that it centred on the assertion and exercise of a right within the province, not being concerned with the existence of a right outside the province. He added "[t]hat it may adversely affect rights arising outside the Province [but this] is not necessarily inconsistent with the statute's validity." [146] Justices Hall and Monnin, in a separate concurring opinion, also held that the legislation is not ultra vires merely because it has extra-territorial effect. Mr. Justice Guy noted in his dissent that the Act removed the right to defend one's self in court and even prevented the defendants from raising the question as to whether or not the damage was a direct result of the act complained of. He stated: "There is something inherently wrong in depriving any citizen of Canada of his right to defend himself in a court of justice . . . ." [147] Commenting in the *Canadian Environmental Law News,* Ian Roland suggests issues that are bound to be in the minds of the Supreme Court upon the appeal:

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[139] *Id.*, § 4(2).

[140] The Queen v. Interprovincial Co-operatives Ltd., 30 D.L.R.3d 166, 1 CELN, No. 3, at 2 (Man. Q.B. 1972).

[141] *Id.* at 184.

[142] *Supra* note 103.

[143] *Id.* at 379-80.

[144] Town of Peace River v. British Columbia Hydro and Power Authority, *supra* note 134.

[145] *Supra* note 103, at 380.

[146] *Id.* at 381.

[147] *Id.* at 390.

> The Assistance Act does not prohibit pollution, it simply places a price tag on it. Thus the Act has possibly added two million dollars to the cost of production of IPCO and Dryden. Certainly the activities that caused the harm should be so assessed.
>
> However, Guy J.A., in his dissent, effectively touches on possible abuses of the Act. It seems quite likely that these two defendants could be required to pay the entire economic loss envisaged by the Act, and yet be only two of many sources of the particular pollution. This forces whoever the Government of Manitoba brings action against to subsidize other similar sources of pollution, possibly even many of these found within Manitoba.
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> Manitoba's approach may be the only practical means of allocating economic responsibility, given the impossible task of proportioning damages to each source of the contaminant. Yet the possibility of unfairness is obvious. [148]

3. *Interjurisdictional Immunity*

"The least satisfactory feature of the present constitutional arrangement is probably the immunity from provincial legislation that the courts have accorded to the federal government and enterprises under its jurisdiction," Gibson has written. [149] He noted, however, that there was some evidence recently of an increased judicial willingness to apply provincial laws to federal property in the case of *Cardinal v. The Attorney-General of Alberta* [150] where the Supreme Court of Canada held that certain provincial game laws were applicable to activities on Indian reserves.

B. *Locus Standi*

Locus Standi has been a favourite topic for academic papers in Canada and a key issue in American environmental litigation. [151] In an environmental context, three basic situations can be distinguished:

1. Statutes, regulations and by-laws creating offences and subjecting the convicted offender to a fine, jail term or other criminal or quasi-criminal sanction;
2. Statutory provisions which establish administrative procedures or which declare rights and obligations but which do not create offences; and
3. Common law civil causes of action.

1. *Statutory Offences*

In the absence of a clause which expressly precludes a prosecution without the consent of a governmental official, any person, whether or not affected by the alleged illegal act or omission, who possesses "reasonable and probable" grounds to believe that a statutory offence has occurred, may lay an information and prosecute the offence.

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[148] 2 CELN 51 (1973).

[149] *Supra* note 99, at 120.

[150] [1974] Sup. Ct. 695, [1973] 6 W.W.R. 205, 40 D.L.R.3d 553 (1973).

[151] See Lucas, *supra* note 6; Estey, *supra* note 6; Eddy, *supra* note 6; Franson, *Standing to Sue to Challenge Environmental Regulation*, *in* ASK THE PEOPLE, *supra* note 2. For the American developments, see ANDERSON, *supra* note 72.

Locus standi for the enforcement of statutes differs markedly from the other situations discussed below and also from the position in the United States where private citizens do not have the right to initiate criminal or quasi-criminal proceedings.

Two recent articles and one (successful) court brief have been published in Canada which effectively cover the substantive and procedural aspects of private prosecutions in environmental matters. [152]

There have been at least five prosecutions reported in the commercial law reports within the past three years in which private citizens have been the informant. [153] In two of these, [154] the informants were not affected by the pollution more than any other person and indeed did not live or work in the area where the offence was taking place. They acted simply as concerned citizens, and at least one judge publicly commended the citizen for so acting.

Further cases of private prosecution are found in the *Canadian Environmental Law News*. [155]

2. *Administrative Procedures and Declaratory Acts*

In this category we include:

i) statutory provisions which establish administrative tribunals or procedures; and

ii) statutory provisions creating rights and obligations (but which do not create offences or create mandatory public duties on specified public officials).

Illustrative of (i) are the licensing provisions described in Part I of this paper, *e.g.*, certificates of approval granted for pollution control equipment under section 8 of the Ontario Environmental Protection Act, [156] tribunals established to hear appeals therefrom, and hearing agencies with powers of recommendation only, such as the present Ontario Environmental Hearing Board, as well as such agencies with powers of decisions.

In category (ii) are statutes such as the National Parks Act [157] and various provincial parks acts which purport to dedicate certain areas of land,

[152] Berner, Private Prosecution and Environmental Control Legislation, (Sept. 1972) (published in limited quantity and suppressed by Environment Canada; available at CELA Library); ENVIRONMENT ON TRIAL, *supra* note 5, Appendix 1—*Private Prosecutions* at 327; CELA, Submissions in support of the Right of the Private Informant to Invoke the Provisions of the Ontario Environmental Protection Act (written brief submitted to the court in Regina v. Adventure Charcoal Enterprises Ltd., *infra* note 153).

[153] Regina v. Adventure Charcoal Enterprises Ltd., 9 Can. Crim. Cas.2d 81, 1 CELN, No. 2, at 1 (Ont. Prov. Ct. 1972); Regina v. Sheridan, [1973] 2 Ont. 192, 10 Can. Crim. Cas.2d 545, 1 CELN, No. 4, at 1 (Dist. Ct. 1972); Regina v. Lake Ontario Cement Ltd., *supra* notes 115 & 116; Regina v. Young, *supra* note 103; Regina v. Cherokee Disposals & Construction Ltd., [1973] 3 Ont. 599, 13 Can. Crim. Cas.2d 87, 2 CELN 158 (Prov. Ct.).

[154] Regina v. Adventure Charcoal Enterprises Ltd., *supra* note 153 and Regina v. Lake Ontario Cement Ltd., *supra* notes 115 & 116.

[155] *Supra* note 3.

[156] *Supra* note 57.

[157] CAN. REV. STAT. c. N-13 (1970).

many of which contain unique natural features, to the residents of their jurisdiction and future generations, so that they are maintained for their healthful enjoyment and education.

For example, the Ontario Provincial Parks Act [158] in section 2 provides that:

> All provincial parks are dedicated to the people of the Province of Ontario and others who may use them for their healthful enjoyment and education, and the provincial parks shall be maintained for the benefit of future generations in accordance with this Act and the regulations. [159]

In regard to the first category, a person will have locus standi to appear before the tribunal, or to appeal from it, if the statute under which the administrative tribunal is established so provides; if the rules of natural justice so provide; or, if the tribunal is given, by its constituent statute, the power, in its discretion, to make any person a party.

A person who cannot bring himself within the statutory definition of a party (if any), who cannot convince a tribunal to recognize him as a party, or who cannot show himself to be so affected by the actions of the tribunal or procedure as to entitle him by reasons of the rules of natural justice to be a party does not, as the law has been interpreted to date, have locus standi.

In regard to the second category, the right of an individual to bring an action in the civil courts to restrain by injunction, or to have declared illegal an alleged excess or abuse of authority by a public or quasi-public body the result of which affects the public, will accrue, as the right accrues in cases of nuisance, on proof that he is more particularly affected than other people. Otherwise, a citizen can, in such a situation, only bring an action if he has the permission of the provincial (or in some cases federal) Attorney-General, and the action must be styled in the Attorney-General's name with someone as relator in the proceedings. The discretion of the Attorney-General as to what is a proper case for him to allow his name to be used is absolute. To bring the action without the Attorney-General, the plaintiff must demonstrate that which he must show in the case of a public nuisance, *i.e.*, that he "suffered some particular, direct and substantial damage over and above that sustained by the public at large." [160]

The illogic of the traditional concept of locus standi in a case of public nuisance (discussed *infra*) being extended to the situation where what the plaintiff is seeking is constitutional behaviour by the government itself was argued strongly on behalf of the plaintiff in the case of *Green v. The Queen*

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[158] ONT. REV. STAT. c. 371 (1970).

[159] *Id.*, § 2.

[160] Grant v. St. Lawrence Seaway Authority, [1960] Ont. 298, at 303, 23 D.L.R.2d 252, at 256. This state of the law, reflected in the *Green* decision, *infra* note 161, is not consistent with the case where a person wishes to question, by certiorari, the legality of the action or omission of an administrative body; in the latter case, the courts seem to have a discretion to allow even a stranger to the earlier proceeding to have locus standi: Lord Nelson Hotel Ltd. v. City of Halifax, 4 N.S.2d 753, 33 D.L.R.3d 98 (1972).

in Right of The Province of Ontario [161] where the defendants, the government and a cement company, sought to have Green's action struck out on a motion that the claim disclosed no reasonable cause of action.

Green's action claimed that, by section 2 of the Provincial Parks Act, [162] the Ontario government had bound itself to keep areas that were set aside as provincial parks secure against political expediency and greedy resource industries, and that the government had breached the trust in leasing unique sand dunes adjacent to Sandbanks Provincial Parks to the cement company for one dollar a year for 75 years, when those dunes had been repurchased by the government for inclusion in the park, and when the removal activities were causing actual damage to the park itself.

Green did not live in that area. He was a concerned environmentalist and a citizen of Ontario. By reason of section 2 of the Parks Act, [163] his counsel argued that, as such, he was entitled to ask the court to ensure the trust was not breached by compelling the trustee to observe its duty, that is, he sought just the relief that any cestui que trust is entitled to expect.

However, as stated, Mr. Justice Lerner of the Ontario Supreme Court extended the public nuisance concept of standing to the case where a person is seeking to ensure the observance of a statute which declares public rights. He completely ignored, in his extensive reasons for granting the defendant's motion and dismissing the action, the argument that if citizens are entitled to expect lawful behaviour from government, then because government must be represented in court by the Attorney-General, it seems doubtful to expect that the Attorney-General would, or even could, lend his permission, let alone his name, to an action against the government, and therefore that the courts must allow citizens, in these situations, to ensure that the law is enforced.

Given that environmental problems do not readily fit into that traditional legal mould of *A. v. B.*, but rather A. versus everybody else (wherein A. could either be a polluting industry or government agency which has exceeded or abused its authority), it is appropriate that some of Canada's most progressive jurists have recently given a long-overdue dusting to the ancient closet of procedural barriers, wherein locus standi lay hiding to trap those who would seek either redress from particular harm, or merely legal behaviour on the part of government.

The fundamental step leading to judicial reform was the unanimous decision of the Supreme Court of Canada rendered by Chief Justice Laskin in *Thorson v. Attorney-General of Canada No. 2.* [164]

A case comment, published shortly after *Thorson* in the *Canadian Environmental Law News*, predicted that it may well form the basis for showing that the ratio of *Green* as to standing was incorrect and that "when litigation

[161] [1973] 2 Ont. 396, 34 D.L.R.3d 20, 2 CELN 4 (High Ct. 1972).
[162] *Supra* note 158.
[163] *Id.*
[164] 43 D.L.R.3d 1 (S.C.C. 1974).

involving [an alleged abuse or excess of public authority] again comes before a civil court it will not be summarily dismissed on the basis that no citizen has the status in law to challenge the illegal activities or omissions of the government . . . ." [165]

Nevertheless this writer, as the author of that comment, was amongst the most surprised when the Manitoba Court of Appeal, very shortly thereafter, in the context of an environmental case, swept away the *Green* ratio and all the other illogical and irrational decisions which Justice Lerner in *Green* chose to so willingly follow.

The Manitoba decision came in *Stein v. the City of Winnipeg.* [166] Because it is the highest judicial opinion on locus standi directly in an environmental context and because it discusses the role of the courts in the supervision of the environmental assessment process, it is perhaps the most important Canadian environmental decision yet decided.

The city executive policy committee failed to review (pursuant to the provisions set out in Part I of the City of Winnipeg Act [167]) a proposal for the spraying of the chemical, methoxychlor, on the City's trees and shrubs to control tree-leaf eating insects. The plaintiff alleged that this was a toxic insecticide, that she was amongst a class of persons susceptible to it, that there was a biological alternative available that was not toxic to warm blooded animals including humans. The City admitted that, although the programme was to be carried out on city property, there would be an inevitable drift onto adjacent private property.

In the Queen's Bench Division, Ms. Stein's application for an interlocutory injunction was dismissed for reasons not related to status but, on appeal, status was a major issue. Although the appeal court split two to one as to whether an injunction ought to issue, all three justices, including Chief Justice Freedman, agreed as to the Plaintiff's right to have locus standi.

The following is the unanimous opinion of the Court of Appeal, as written by Mr. Justice Matas on the issue of locus standi. As it relates how Chief Justice Laskin's judgment in *Thorson* was the catalyst, it is produced in full:

Status of Plaintiff:

> Defendant argued that, since any harm or injury would be suffered by the public at large, the action should have been brought in the name of the Attorney General: 13 C.E.D. (West 2nd), p. 157, de Smith, p. 401. And see *A.G. ex rel. McWhirter v. Independent Broadcasting Authority.*

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[165] 3 CELN 57 (1974); *see also* Stein v. City of Winnipeg, *supra* note 72, at 492 where the most relevant portions of the *Thorson* case are set out.

[166] Stein v. City of Winnipeg, *supra* note 72. The full style of cause in this case was as follows: Irene Stein in her personal capacity and on behalf of all inhabitants of the City of Winnipeg susceptible to the insecticide methoxychlor, and on behalf of all occupiers of private property in the City of Winnipeg, and on behalf of all inhabitants of the City of Winnipeg who have the right to use its human environment v. the City of Winnipeg.

[167] *Supra* note 78.

[1973] 2 W.L.R. 344, [1973] 1 All E.R. 689, and comment in de Smith, App. 3, p. 527 et seq.

In *Thorson v. A.G. of Can. No. 2* [1974], 43 D.L.R.(3d) 1, [summarized and commented on in 3 CELN 57], the Supreme Court of Canada considered the status of plaintiff, suing as a taxpayer in a class action, claiming a declaration against the Attorney General of Canada that the Official Languages Act R.S.C. 1970, c. 0-2 and Appropriations Acts providing money to implement it are unconstitutional.

The Attorney General had declined to act in his public capacity to challenge the constitutionality of the statute.

A majority of the Court held that plaintiff had status, Laskin, J., speaking for the majority, analyzed previous decisions of the Supreme Court and commented on developments in the law in other jurisdictions. He said at p. 19:

> "I recognize that any attempt to place standing in a federal taxpayer suit on the likely tax burden or debt resulting from an illegal expenditure, by analogy to one of the reasons given for allowing municipal taxpayers' suits, is as unreal as it is in the municipal taxpayer cases. Certainly, a federal taxpayer's interest may be no less than that of a municipal taxpayer in that respect. It is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question."

In the case at bar, under sec. 653, the Legislature has enacted a novel provision with respect to protection of the environment. If the City does not comply with the directive of the section it must be possible for a resident of the city to institute action challenging Winnipeg's right to proceed. By analogy with *Thorson*, supra, the right to institute court action should not require the intervention by the provincial attorney general. As for the suggestion that there would be a proliferation of law suits, Laskin, J. said at p. 6 of *Thorson*, supra:

> "I do not think that anything is added to the reasons for denying standing, if otherwise cogent, by reference to grave inconvenience and public disorder. An effective answer to similar arguments advanced in *Dyson v. The A.G.*, [1911] 1 K.B. 410, was given by Farwell, L.J., in his reasons at p. 423, reasons endorsed by Fletcher Moulton, L.J., in the second *Dyson* case, [1912] 1. Ch. 158 at p. 168. The Courts are quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs."

In the case before us, s. 653 must be read in the context of the whole of the Act. One of the important aspects of the legislation is an express intention to involve citizen participation in municipal government, e.g. ss. 23 and 24 on community committees, ss. 609 et seq. on zoning. Section 653 has created an obligation to review the environmental impact of any proposal for a public work which may significantly affect the quality of human environment. If that section is not to be considered as a mere pious declaration there must be inferred a correlative right, on the part of a resident, in a proper case, to have a question arising out of the sections adjudicated by the court. In the case at bar, taking into account the facts

> outlined above, I am of the opinion that Stein has the status to bring this action for the Court's consideration. [168]

What the Manitoba Appeal Court and Supreme Court of Canada have done in these decisions is something that most environmental law writers opined was impossible. They claimed the rules of standing had been so confirmed by precedent that only the legislature could effect a change. It is heartening to know that these writers, including this author, were wrong and that some members of the judiciary are ready to take up the challenge of making innovative and relevant decisions. These decisions stand as encouragement to forceful criticisms, oral and written, of antiquated procedural doctrines which make the courts irrelevant, and as an example to other members of the judiciary before whom similar challenges will come.

3. *Common Law Causes of Action*

Locus standi for the purpose of bringing suit based on common law causes of action has been well defined for many years for the traditional causes (riparian rights, trespass, negligence and private nuisance). The only unsettled area appears to be an action based upon a "public nuisance".

Public nuisance has been defined as an act or omission not sanctioned by law which causes inconvenience or damage to, or interferes with, the reasonable comfort of a class of Her Majesty's subjects in the exercise of a right common to all. Such rights include a broad spectrum of rights or interests, including the right to fish and to breath relatively clean air. Provided a person has locus standi, he may wish to invoke the doctrine in a situation where he has benefited from a public right, which is important to him, but which is not protected or encompassed by proprietary interests. Most commonly, in Canadian environmental jurisprudence, the cause of action has been invoked by commercial fishermen against industries polluting waters where their traditional fishing takes place. The second reason why public nuisance is attractive to those concerned about general environmental degradation is that it is an action which appears to stress the plaintiff's concern for the public interest.

As Dean John McLaren of the University of Windsor's Law Faculty has written:

> Given the environmental litigant's concern for championing what he conceives to be the public interest, public nuisance which purports to protect the individual in the exercise of his public rights . . . would seem to be an obvious choice . . . . Reality, however, is less than kind to the plaintiff in this regard . . . . The civil litigant . . . has no inherent standing to sue in the public interest, as a private attorney-general. Well established Canadian authority holds that if the vindication of the public interest is required then the only party who has standing to initiate . . . a civil suit is the governmental representative of that interest, usually the provincial, but on occasion the federal, Attorney-General. Even a municipality, which one might have thought would have a claim to standing as the custodian of the

[168] Stein v. City of Winnipeg, *supra* note 72, at 496-98.

> local community interest, has been found impotent in this respect. As action by the Attorney-General is discretionary, there is no guarantee that he will respond affirmatively to complaints and pleas for action by concerned citizens." [169]

McLaren also points out that:

> In addition to its limited viability as an action for the citizen to protect the public interest, public nuisance has distinct shortcomings as a vehicle for the protection of individual rights. Consonant with their desire to divorce the public and private rights in this action, the courts have sought to limit its application to situations in which the plaintiff can claim damage which is "special", that is different from that which is or could be expected to be suffered by other members of the public. [170]

The restriction of the utility of the doctrine was taken to the extreme in the 1972 case of *Hickey v. Electric Reduction Co. of Canada* [171] in which Chief Justice Furlong of the Newfoundland Supreme Court dismissed the action of a group of commercial fishermen who claimed to have suffered a loss in revenue due to the pollution of Placentia Bay by the defendant's plant.

McLaren has commented that this decision suggests that a plaintiff, or group of plaintiffs, who make a special use of a public facility in conjunction with others in the neighbourhood are barred from suit, on the ground that their damage, in relation to other members of the class, is not unique. He says:

> If this reasoning is followed, it means that in certain geographical locations, where a significant proportion of the populace engages in a special productive use of public water resources, that special *use* will be the sole frame of reference as to whether the *damage* is special or not. For practical purposes the public equals the special class. Thus counsel who is denied the freedom to sue in the general public interest may now face the further obstacle that he cannot represent that segment of the populace which is most adversely affected by it, if that segment is too large. [172]

Beyond the problem of categorizing the damage as "special" when the whole or a large proportion of the local community are adversely affected and suffer the same type of damage, is the issue of whether purely financial loss, as opposed to personal injury or property damage, is within this designation. The *Hickey* case, which is supported by other decisions relating to commercial benefits derived from fisheries, denies that it does on the basis that, since a plaintiff can have no greater rights than other members of the public in fishing, any damage which flowed from pollution of the fishery was, by definition, merely different in degree from that incurred by others.

As McLaren and other writers [173] have pointed out, however, there is a countervailing trend on this issue in Canadian jurisprudence:

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[169] McLaren, *supra* note 6, at 511-12.
[170] *Id.* at 512.
[171] 2 Nfld. & P.E.I. 246, 21 D.L.R.3d 368 (Nfld. Sup. Ct. 1971).
[172] McLaren, *supra* note 6, at 513.
[173] See Estey, *supra* note 6.

> There exists a triad of Ontario appellate decisions which have come to the opposite conclusion in an analogous context. Each of these decisions make it clear that financial loss incurred by commercial concerns engaged in shipping enterprises on navigable waterways by obstructions to navigation, amounts to "special damage". There is no difference in principle between financial loss flowing from interference with the commercial uses of the right to navigate and the right to fish in public waters. [174]

He also points out that there are three early Ontario cases which imply that an aggravated degree of inconvenience in the use of various types of thoroughfares (highways, and navigable waters) is enough to found a private action in public nuisance. From these cases it may be argued that "the interference in each case came close to being an invasion of the property right of unobstructed ingress and egress, and thus tantamount to a private nuisance." [175]

But McLaren says that:

> At best their authority as support for a difference in degree as the appropriate criterion may be described as tenuous. In consequence, it is not possible to be confident about using public nuisance inventively [to] protect individuals who are subjected to an aggravated degree of inconvenience from pollution in public places. [176]

McLaren concludes that:

> The restrictive nature of the rules surrounding the private action in public nuisance, and the unsatisfactory state of Canadian case authority, suggest that the action has limited potential as a means of vindicating the interests of environmentalists. The unfortunate irony of the development of this branch of the law of nuisance is that the chances of the concerned citizen achieving positive results decrease in inverse proportion to the gravity of the offending pollution problem and its adverse consequences. The environmental lawyer is effectively hamstrung in seeking to inject the anti-pollution perspective into the action, because he has to avoid at all costs giving the impression that the defendant's activity is causing a widespread common problem. If he does then his client's damage may become indistinguishable from that suffered by the rest of the community, and he will fail to sustain the unique nature of his claim. [177]

It may also be said that, given the very burdensome party-and-party costs system existing in Canadian civil courts, little experimentation may be expected at the instance of private litigants using public nuisance as their cause of action. Given what was said by Chief Justice Laskin in *Thorson*, however, it is evident that the policy reasons underlying the judicial roadblock in place to this point—fear of a multiplicity of claims and the launching of trivial suits—should be re-examined. Michigan has in recent legislation allowed any citizen to sue in public nuisance, [178] and yet a three year study has

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[174] McLaren, *supra* note 6, at 514.

[175] *Id.*

[176] *Id.* at 514-15.

[177] *Id.* at 515.

[178] *See* Environmental Protection Act of 1970, Mich. Comp. Laws Ann. 691. 1201-.1207 (Supp. 1973), Mich. Stat. Ann. 14.528 (201)-(207) (Supp. 1973). This statute is set out in full in ENVIRONMENT ON TRIAL, *supra* note 5, App. IV, at 344.

conclusively shown that the courts are not being overwhelmed with litigation, let alone frivoulous suits. [179] Calls for reform in this area are being made, [180] but even with a change in the rules of locus standi, court costs will prevent much use of the doctrine until cost provisions are also changed. [181]

C. *Judicial Review of Environmental Procedures*

Until environmental statutes are enforced to a greater degree than they have been to date, courts will obviously not have an opportunity to judicially interpret them, or to fully consider the role of judicial review in relation to the purpose of the statutes. The cases to date however indicate that, given the proper circumstances, the courts will indeed become involved in reviewing the merits of administrative decisions, as they in fact did in all three cases to be discussed. In none of the cases did the court per se refuse this task, and where the judge felt it appropriate, he rolled up his sleeves and waded into an examination of the merits.

Perhaps the most eloquent case for judicial review of administrative environmental proceedings was that stated by the Manitoba Court of Appeal in *Stein v. City of Winnipeg.* [182] In this case, involving pesticide spraying, aspects of which have been previously mentioned, the federal government had approved the use of methoxychlor as an ingredient in a number of pesticides and had published information as to its use and as to effects of usage. Further, Manitoba legislation required any use of the chemical in that province to receive the prior public scrutiny of the Manitoba Clean Environment Commission, which had authorized the city to use it under certain conditions. When Stein brought her case for an injunction before the Manitoba Queen's Bench division, the chambers judge had ruled that:

> Our system of law in this country, so far as I know, does not enable me to substitute my opinion, on an interlocutory application, for that of the body charged with the responsibility of investigating that particular spray . . . . The Commission is the body charged with making that decision, and it has made a decision, and if that decision was made in accordance with the law, then it may not be set aside at the whim of the Court. [183]

The Manitoba Court of Appeal disagreed however. Mr. Justice Matas, in

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[179] Sax & Dimento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974).

[180] See Kennedy, *Foreword* to ENVIRONMENT ON TRIAL, *supra* note 5; the Canadian Bar Association 1971 and 1973 Annual Meeting resolutions set out in Part 1, *supra*; Franson, *supra* note 151; Canadian Bar Association (Ontario Branch), Brief to the Ontario Ministry of Environment, Nov. 13, 1972; CELA, Recommendations of the Canadian Environmental Law Association to the Task Force on Legal Aid for the Province of Ontario, March 26, 1974 (available from CELA).

[181] For remarks by an Ontario Supreme Court Justice cogently putting the case for drastic revision of the civil court costs system, *see* Haines J., Book Review, 51 CAN. B. REV. 707, at 709 (1973).

[182] *Supra* note 72.

[183] *Id.* at 494-95.

his majority opinion (and Chief Justice Freedman did not dissent on this point), held that the approach taken by the chambers judge

> . . . is unduly restrictive of the Court's function . . . . the function of the commission is quite different from that of the Court. It is only the Court which can examine the basic legal authority of the city to act and which can then make the appropriate order, encompassing the relevant remedy at law. [184]

Mr. Justice Matas quoted with approval from both American environmental jurisprudence and academics who have examined the history of the National Environmental Policy Act (NEPA) [185] upon which the Winnipeg legislation was patterned. The rational for wide judicial review as put by F. R. Anderson, in his recent book, *NEPA In The Courts*, [186] was quoted with approval:

> Although a general trend may exist reflecting wide dissatisfaction with numerous aspects of administrative performance, there may be a special reason why the courts have so closely reviewed agency decision making in the environmental area. Agency decisions in this area more frequently involve vital personal interests such as life, health, and safety which, if offered inadequate protection or allowed to be abused, could conceivably have far more injurious consequences to the public than agency abuse of traditional functions of economic regulation. There is a great deal of difference between regulating the securities market, and establishing levels at which air pollution poses an imminent danger to health; between awarding broadcast licenses, and determining the hazardousness of a pesticide; between fixing maximum rates that can be charged for livestock, and setting human health tolerances for asbestos, beryllium, or mercury. The courts may have concluded that the principles of judicial review forged in the heyday of economic regulation are not adequate for today's agency decisions which vitally affect health and other personal interests. Such interests have always had a special claim to judicial protection, especially when balanced against economic interests. [187]

His Lordship concluded his remarks on the court's jurisdiction by holding that neither federal approval nor the Commission's order should preclude examination by the court of the legal basis for the City's actions. He held that even the decision by the Minister, in considering whether to stay or reverse the City's action, would not be based on the same principles as would be required of the court in making its determination. [188]

Perhaps the most narrow, and thus opposite, view of the proper scope for judicial review of environmental licencing procedures occurred in the case of *Heineman v. Adventure Charcoal Enterprises Ltd.* [189] Heineman, a Toronto musician, moved to a farm in the rural Barry's Bay area, west of Pembroke, Ontario, to give his family a quieter and cleaner home. He was

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[184] *Id.* at 495.
[185] *Supra* note 71.
[186] *Supra* note 72.
[187] Stein v. City of Winnipeg, *supra* note 72, at 496.
[188] *Id.*
[189] 1 CELN, No. 3, at 4 (Ont. High Ct. 1972).

soon confronted with the planned construction of a charcoal plant to be built within one hundred yards of his farm. He tried to object to the pollution and to the change in the character of the area, from rural and recreational to industrial, that the grant of certificates of approval for plant construction under the Ontario Environmental Protection Act [190] would legalize. The Ministry of Environment and, in particular, the Director of the Air Management Branch would give him no official opportunity for a hearing. None is required under the Environmental Protection Act [191] (although if an *applicant* for a certificate is refused a certificate, or has imposed in it a condition he finds unacceptable, he has the right to appeal). When the Ministry issued certificates of approval for the ten kilns being built, Heineman asked the Divisional Court of the Supreme Court of Ontario to quash the certificates, to order the Air Management Branch to prepare an environmental impact report about the plant, to make the report available, and to prevent any new or amended approvals from being issued until he was given an opportunity to see such reports and file objections. His counsel argued that Heineman had been denied his basic rights to be given notice of the plant's location, to examine the material submitted to support the application, and thus to make meaningful representation in regard to the application in a situation where the Air Management Branch was making, in effect, a quasi-judicial decision. Heineman's counsel pointed out that there was no zoning by-law or other local control of industrial sites for the area and argued that, in issuing certificates, the government was in fact authorizing a change in land use which affected Heineman's property. If this was a zoned part of Ontario, counsel argued, the highest judicial authority would guarantee him these basic rights. But the Divisional Court, after a brief hearing, shortly dismissed the application with costs. Mr. Justice Donnelly, ruling for the court, pointed out that the Act did not provide a right of hearing and held that the Director's decision in issuing certificates was not judicial (without giving any reasons for so holding). Donnelly simply pointed out that there was a Director in whom the Government apparently had confidence, who said he was satisfied that there would be no harmful emissions. Mr. Justice Donnelly did allow that Heineman might have some right to make his opinion and point of view known to Air Management, but he noted that Heineman had written several letters to the government, and that this was the extent of his rights. Chief Justice Wells added that the time to test the situation would appear to be when the plant starts operations.

The validity of the decision in *Heineman* appears to be questionable, in light of both the judicial pronouncements argued by his counsel, [192] and more recent ones which illustrate in one case [193] how the courts usually seek

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[190] *Supra* note 57.

[191] *Id.*

[192] Wiswell v. The Metropolitan Corporation of Greater Winnipeg, [1965] Sup. Ct. 512 (1964); Re Zadrevec, [1972] 3 Ont. 514, 28 D.L.R.3d 641 (Divisional Ct.), *as modified by* [1973] 3 Ont. 498, 37 D.L.R.3d 306.

[193] Lazarov v. Secretary of State of Canada, 39 D.L.R.3d 737 (Fed. Ct. 1973).

to ensure that even an administrative decision which affects a person's rights must be rendered in a judicial manner to the extent that the person must be given a fair opportunity, in one way or another, of stating his position with respect to any matters which, in the absence of refutation or explanation, would lead to the grant of a licence prejudicial to his rights; and in the second case, [194] that even though the statute is silent, when a provincial minister is given the power to approve a municipal by-law, he must act in a judicial manner, giving those interested a fair opportunity to be heard. Unfortunately, again because of the civil costs system, Heineman could not consider an appeal.

In stark contrast to the *Heineman* decision, in which a frankly "freaky" musician sought to invoke basic rules of natural justice, stands the judicial attitude displayed as the result of an application for judicial review, brought by a powerful, large industry who were vexed by a government administrative order.

In *Re Canada Metal Co.*, [195] Mr. Justice Keith of the Ontario Supreme Court had no hesitation in quashing a stop order, issued 72 hours prior to the hearing of the application for judicial review, which had the effect of closing down the applicant's operation. The order was issued in the midst of continuing criticisms of the Ontario Environment Ministry's handling of lead emissions from secondary lead smelters into adjacent residential neighbourhoods. The stop order was handed out immediately after data showing some high-lead levels in persons residing near to the applicant's plant had been received from the City of Toronto's Board of Health and had been publicised in the media.

The Supreme Court of Ontario had no difficulty in finding, in this instance, that the Director of the Air Management Branch, in issuing a stop order, must act judicially, and that he had failed to do so in this case because he had adopted a subjective, instead of an objective, test of the danger to health that was alleged to be caused by the applicant's operations. Mr. Justice Keith reviewed in detail the affidavit evidence and commented extensively on its value and lack thereof in terms of deciding whether the Director had acted judicially and decided that "viewing the matter objectively, which the Director should have done, his undoubted power was exercised arbitrarily and not judicially." [196] The court made plain its sympathies in the matter, noting the rights even of the applicant's customers! In the court's words:

> Much has been heard of the views of the community. It is all too easy to forget that the applicants and their employees and customers also have well-founded interests to be considered.
>
> All our freedoms depend on the proper exercise of the rule of law,

[194] Re Hershoran, 1 Ont.2d 291 (High Ct. 1973), *aff'd*, 3 Ont.2d 423 (1974).
[195] 1 Ont.2d 577, 41 D.L.R.3d 161, 2 CELN 161 (High Ct. 1973).
[196] *Id.* at 590.

> and the rejection of the rule of man in an unjudicial way . . . . For all these reasons, the applicants are entitled to succeed . . . .[197]

III. An Annotated Summary of Case Developments Since 1970

A. *Air*

Under section 8 of the Ontario Environmental Protection Amendment Act, 1972 [198] (similar provisions being found in other provincial environmental licencing statutes) which provides that "no person shall, (a) construct, alter, extend or replace any plant, structure, equipment, apparatus, mechanism or thing that may emit or discharge . . . a contaminant into any part of the natural environment . . . or, (b) alter a process . . . with the result that a contaminant may be emitted . . . into any part of the natural environment . . . unless he has first obtained a certificate of approval issued by the Director . . .", the onus lies on the applicant to demonstrate to the Director that the devices for pollution control suggested by him are effective, and the onus lies with him to secure approval: *Regina v. Adventure Charcoal Enterprises Ltd.* [199]

In issuing a certificate of approval pursuant to the (above described) provisions of section 8 of the Ontario Environmental Protection Amendment Act, a director of the Ministry of Environment is not required to act judicially, at least in so far as affected persons other than the applicant are concerned: *Heineman v. Adventure Charcoal Enterprises Ltd.* [200]

The provision in section 12 of the Ontario Environmental Protection Act, [201] which allows a Director of the Ministry of Environment, when he is of the opinion, based upon reasonable and probable grounds, that it is advisable or necessary for the protection or conservation of the natural environment, the prevention or control of an immediate danger to human life, the health of any person, or to property, to issue an order directed to the person responsible to stop the operation of the source of contaminants, requires that he nevertheless act judicially. The whole concept of the statute indicates a judicial approach to such a serious thing as the issuance of a stop order: *Re Canada Metal Co.* [202]

A prohibition against the emission of air contaminants to such extent or degree as may cause discomfort to persons, as is found in regulations under the Ontario Environmental Protection Act, is an absolute offence in which mens rea need not be proved: *Regina v. Peconi* [203] and *Regina v. Ford Motor Co. of Canada.* [204]

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[197] *Id.* at 591.
[198] Ont. Stat. 1972, c. 106.
[199] *Supra* 153.
[200] *Supra* note 189.
[201] Ont. Stat. 1972, c. 86.
[202] *Supra* note 195.
[203] [1970] 3 Ont. 693, 14 D.L.R.3d 17, 1 Can. Crim. Cas.2d 213 (High Ct.).
[204] 12 Can. Crim. Cas.2d 8, 2 CELN 55 (Ont. Prov. Ct. 1973).

Aerial spraying of pesticides may constitute a common law nuisance: *Newman v. Conair Aviation Ltd.* [205]

B. *Constitutional*

1. *Validity of Provincial Environmental Legislation*

Manitoba legislation, imposing liability in Manitoba for activities outside the province which pollute Manitoba waters and consequently deprive commercial fishermen of their incomes, relates to property and civil rights in the province and to a subject-matter of a local and private nature, and is hence intra vires: *The Queen v. Interprovincial Co-operatives Ltd.* [206]

An anti-noise by-law enacted under the authority of the Ontario Municipal Act, [207] is intra vires and can live concurrently with section 171 of the Criminal Code (causing a disturbance); the imposition of a fine does not render the by-law criminal legislation: *Regina v. Young.* [208]

Section 14 of the Ontario Environmental Protection Act, which makes it an offence to "deposit, add, emit or discharge" a contaminant into the natural environment likely, *inter alia,* to impair the quality thereof, is not criminal law but is legislation in relation to property and civil rights in their origin local and provincial, and falls within sections 92(13) and 92(16) of the B.N.A. Act; whether or not pollution is a matter of "national concern", the "peace, order and good government" clause is neither applicable nor available where no federal legislation is under review: *Regina v. Lake Ontario Cement Ltd.* [209]

Parliament has been found to have exclusive jurisdiction over many matters not specifically mentioned in the B.N.A. Act, and as pollution is not mentioned specifically, Ontario legislation must fall when it is superseded by federal legislation: *Regina v. Continuous Colour Coat Ltd.* [210]

2. *Interprovincial Pollution*

Where a claim is made for damage to a water supply within Alberta caused by damming of the river done in British Columbia, the tort is committed within Alberta, and service of the statement of claim ex juris is justified: *Town of Peace River v. B.C. Hydro and Power Authority.* [211]

Manitoba's Fishermen's Assistance and Polluters' Liability Act [212] is valid provincial legislation although it has various extra-territorial effects: *The Queen in Right of Manitoba v. Interprovincial Co-operatives.* [213]

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[205] 33 D.L.R.3d 474 (B.C. Sup. Ct. 1972). See also *infra*, "noise".
[206] *Supra* note 103.
[207] ONT. REV. STAT. c. 284 (1970).
[208] *Supra* note 103.
[209] *Supra* note 115.
[210] *Supra* note 131.
[211] *Supra* note 134.
[212] Man. Stat. 1970 c. 32.
[213] *Supra* note 103 (discussed in text at n. 136 *et seq.*) (on appeal to the S.C.C.).

C. *Evidence*

Opinion evidence by ordinary persons as to what constitutes impairment of the environment may be admissible: *Regina v. Cherokee Disposals & Construction Ltd.* [214] and *Regina v. Sheridan.* [215]

For other cases raising other evidence issues under the Ontario Water Resources Act, [216] see the "Water" section *infra.*

Circumstantial evidence of the source of oil pollution may be sufficient for conviction under the *Canada Shipping Act*: [217] *Regina v. The Vessel Himmerland.* [218]

In an action claiming damage to buildings caused by nearby blasting, it is not enough to base the findings of a casual relationship between the blasting and the damage on speculation and conjecture. Where an expert testifies, but has no knowledge of the soil and has conducted no tests, an inference of causation based on facts actually observed and proved cannot be drawn, and the trial judge cannot validly conclude, on the basis of such evidence, that causation has been established: *Roy Judge Co. v. Norris.* [219]

Evidence establishing risk of a land slide in an area proposed for a new residential subdivision that does not establish an immediate risk, but one which could conceivably be realized within the life of the community, although it may not be within the first generation residing there, is sufficient to base a decision that approval of the sub-division is not in the public interest: *Re Application for Approval of a Proposed Subdivision by Cleveland Holdings Ltd.* [220]

D. *Judicial Review*

The provisions of the federal Aeronautics Act, [221] particularly section 3(2) imposing a duty on the Minister of Transport to "supervise all matters concerned with aeronautics" does not impose a duty on the Minister to make a thorough investigation of all violations of the Air Regulations that are reported to him. The statute does not spell out the way in which the Minister is to carry out his duty. The statute implies that the Minister and his officials will exercise a fair amount of discretion, and the courts should not interfere with a discretion to take action or prosecute an alleged violation of the Act or regulations. Accordingly, an application for mandamus to compel the Minister to enforce the provisions of the Act, so that planes taking off and landing at a privately owned and federally licenced airport are no longer flying over the applicant's residence and barn, will be dismissed where

[214] *Supra* note 153 (water and soil pollution).
[215] *Id.* (water pollution).
[216] ONT. REV. STAT. c. 332 (1970).
[217] CAN. REV. STAT. c. S-9 (1970).
[218] Noted at 2 CELN 17 (Ont. Prov. Ct. 1973). The complete judgment is available from CELN.
[219] 5 N.S.2d 185, 37 D.L.R.3d 241 (1973).
[220] 2 CELN 114 (B.C. Sup. Ct. 1973).
[221] CAN. REV. STAT. c. A-3 (1970).

the evidence shows that there was not a decision made *not* to enforce the statute or the regulations and, that as soon as the Department of Transport officials were informed of the applicant's complaints of noise and danger from low-flying aircraft, they conducted an investigation that they deemed appropriate. If such officials fail to lay charges or take any disciplinary measures against alleged violators, because they honestly believed that these alleged violations had not taken place or could not be proved, the Minister and his officials have carried out their duties under the statute: *Harcourt v. Jamieson.* [222]

The City of Winnipeg had obtained the approval of both the federal government and, as required by legislation, the Manitoba Clean Environment Commission for the use of methoxychlor as an ingredient in a number of pesticides, and yet it was found that it is only the court which can examine the basic legal authority of the City to act and then make the appropriate order. Neither federal approval nor the Commission's order should preclude examination by the court of the legal basis for the City's actions: *Stein v. City of Winnipeg.* [223]

The Director's decision in issuing certificates of approval under the Ontario Environmental Protection Act [224] for construction of a charcoal plant is not judicial, and an individual affected by the decision has no rights apart from making his views known to the government: *Heineman v. Adventure Charcoal Enterprises Ltd.* [225]

Where the Director of the Ministry of Environment issues a stop order under the Ontario Environmental Protection Act, he must act judicially and if he fails to do so, certiorari lies against him under the provisions of the Judicial Review Procedure Act, 1971: [226] *Re The Canada Metal Co.* [227]

Objections filed with the Director of the British Columbia Pollution Control Branch on behalf of interests that may be affected regarding the grant of permits under the British Columbia Pollution Control Act, [228] must receive a fair and judicial consideration. Material filed by applicants must be provided to anyone who files an objection as of right under section 13(2) of the Act: *Western Mines Ltd. (N.P.L.) v. Greater Campbell River Water District*; [229] *Re Application of Hooker Chemicals (Nanaimo) Ltd.*; [230] *Re Hogan.* [231]

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[222] 2 CELN 149 (Fed. Ct. 1973).
[223] *Supra* note 72, 165 & 182.
[224] Ont. Stat. 1971 c. 86.
[225] 1 CELN, No. 3, at 6 (Ont. High Ct. 1972).
[226] Ont. Stat. 1971 c. 48.
[227] *Supra* note 195.
[228] B.C. Stat. 1967 c. 34.
[229] 58 W.W.R. (n.s.) 705, 61 D.L.R.2d 221 (B.C. 1967).
[230] 75 W.W.R. (n.s.) 354 (B.C. Sup. Ct. 1970).
[231] [1972] 3 W.W.R. 519, 24 D.L.R.3d 363 (B.C. Sup. Ct.).

E. *Land Management*

The purpose of the Territorial Land Use Act, [232] applicable to the Northwest Territories and the Yukon, is to protect the control and use of the surface of the land, a land which, although tundra in nature and frozen over for many months each year, is nonetheless a delicate land, easily damaged and perhaps, when once damaged, impossible to repair. Even when no actual damage takes place by reason of a man-made activity which is contrary to that allowed under the Act, the sentence should be concerned with what the damage might have been. To fine a large corporation found guilty of breaching a permit issued under the Act 100 dollars is to, in effect, invite breaches. The deterrent element must be stressed by the courts in the hope that a gamble to risk breaking the law will not be taken because it is too costly. Accordingly, although the accused had operated a tractor across the Tundra under contract to Gulf Oil 9 days after Gulf's land use permit had expired and it had relied on Gulf to have a valid permit, and although there was no evidence of real damage having been done, and the accused was a small local company with a record of being a good citizen to the community, and had pled guilty at trial, on appeal the fine was raised from 100 to 2,000 dollars: *Regina v. Kenaston Drilling (Arctic) Ltd.* [233]

Where a large oil company causes the pollution of northern lands as the result of a drilling site sump overflowing into a nearby creek, a fine of 3,000 dollars is appropriate. Despite the fact that it would be of little consequence to a large company, it will indicate to others the gravity with which the court views infractions which cause damage to the environment of a remote but still fragile land which the people of Canada are trying to protect: *Regina v. Panarctic Oil Ltd.* [234]

The effects of a massive Quebec hydro-electric project are such as to constitute irreparable harm both to the environment and to interests of the native peoples in maintaining a natural environment, and accordingly the project ought to be restrained pending the trial of the action: *Kanatewat v. The James Bay Development Corp.* [235] This was reversed by the Quebec Court of Appeal which held that: "The public interest and generally the people of Quebec oppose the interests of about 2,000 [*sic*—the facts found by Mr. Justice Malouf put the native population at nearly 10,000] of these natives. We are of the opinion that the two opposing interests will not suffer comparatively . . ." and accordingly the interlocutory injunction ought to be dissolved.

Section 2 of the Ontario Provincial Parks Act, [236] which provides that "[a]ll provincial parks are dedicated to the people of the Province of Ontario and others who may use them for their healthful enjoyment and education,

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[232] CAN. REV. STAT. c. T-6 (1970).

[233] 12 Can. Crim. Cas.2d 388, 41 D.L.R.3d 252, 2 CELN 42 (N.W.T. Sup. Ct. 1973).

[234] 2 CELN 168 (N.W.T. Mag. Ct. 1973).

[235] 3 CELN 3 (Que. Sup. Ct. 1973) (Malouf, J.), *rev'd*, 3 CELN 19 (1973).

[236] ONT. REV. STAT. c. 371 (1970).

and the provincial parks shall be maintained for the benefit of future generations in accordance with this Act and the regulations . . .", does not create a trust. There is no certainty of subject matter and, section 3(2) empowers the Cabinet by regulation to increase, decrease or even put an end to the existence of any park. The Government of Ontario cannot be compelled to hold any park lands for the purposes claimed to be found in section 2. The Government has an unfettered and wide-ranging power in the operation and use of its parks not only for the benefit of the public but also for private business, activities of special classes, etc. All of which depends upon the discretion of the Government: *Green v. The Queen.* [237]

Where a strip of land, containing two sixty-five year old white spruce trees on the claimant's front lawn, is expropriated for a highway widening, such trees "are valuable assets on a residential property and are of substantial value" and accordingly a fair allowance for injurious affection by way of personal and business damages for their removal is 500 dollars apiece: *Andela v. The Corp. of the County of Wellington.* [238]

F. *Locus Standi*

A civil court may grant standing to any citizen who seeks a declaration against, or an injunction to restrain, a public or quasi-public body which has exceeded or abused its authority or failed to perform its duty in such a manner as to affect the public: *Stein v. City of Winnipeg.* [239]

In an action in which it is alleged that a public or quasi-public body has exceeded or abused its authority in such a manner as to affect the public, whether a nuisance be involved or not, the right of the individual to bring the action will accrue, as it accrues in cases of nuisance, on proof that the plaintiff is more particularly affected than other people: *Green v. The Queen.* [240]

Any person who has reasonable and probable grounds to believe that a provision of the Ontario Environmental Protection Act, or regulations thereunder, have been breached may act as informant and prosecute the accused in the Criminal Courts: *Regina v. Adventure Charcoal Enterprises Ltd.* [241]

Where a statute provides that an "interested person" may be heard to object to an application for subdivision approval, the usual considerations relating to standing have no application where profound issues of public safety (in this case approval of a residential subdivision in a potential landslide area) arise. Accordingly, where a civil engineer (who also was active in a conservation group) who does not live in the area in issue appears and has specialized knowledge to offer the court, he will be heard: *Re Application for Approval of a Proposed Subdivision by Cleveland Holdings Ltd.* [242]

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[237] *Supra* note 161.
[238] 2 CELN 14 (Ont. Land Compensation Bd. 1972).
[239] *Supra* note 72.
[240] *Supra* note 161.
[241] *Supra* note 153.
[242] *Supra* note 220.

G. *Noise and Vibrations*

The owner of a rural summer week-end and holiday residence is entitled to an injunction restraining a neighbouring property owner from using any portion of his property for the operation of a trap shooting and game hunting enterprise. A blanket injunction, rather than one allowing shooting on a portion of the defendant's property, as allowed by the Court of Appeal, was justified according to Mr. Justice Laskin because of the "recurring, continuous noise associated with the hunting activities permitted by the [defendant] on his land, situated in a locality to which such noise was foreign. The absence of physical injury or property damage does not affect the right to an injunction where there is conduct, not merely temporary, which materially interferes with the conduct and enjoyment of living in the locality." The fact the plaintiff knew or ought to have known when he purchased the property that there was a game farm on adjoining land does not advance the defendant's case, as it was the only game farm in the area and "had no place there on the facts respecting its operation.": *Epstein v. Reymes.* [243]

The mere fact that small noisy aircraft flew low over the plaintiffs' house annoying and disturbing them, is not a trespass. Where the evidence does not show that the aircraft using the defendant's privately-owned airport did anything more than fly low, or near, the plaintiffs' property, the only remedy, if any, is in nuisance: *Harcourt v. Jamieson.* [244]

Nuisance is not established where the plaintiffs' evidence and that of their witnesses (which included films, pictures, sound recordings and the testimony of formerly retained and neighbouring lawyers) to the effect that the noise interfered with conversation is contradicted by defendant's witnesses, residing nearer the airport than the plaintiffs, who testified that they were in no way bothered or inconvenienced by the sight or the noises of the aircraft which constantly fly low over their houses; where the evidence is that the president of the airport company had instructed pilots and students to avoid flying over the plaintiffs' property, and that most aircraft flew over or near the property of witnesses called by the defendants rather than over the plaintiffs' residence. In such circumstances it appears that the evidence given by the plaintiffs and their family is most unreliable—not because they are not honest but because they have become so obsessed with the presence of aircraft over their property that they unfairly exaggerate the minor inconvenience that they suffer. If the plaintiffs and their family were not oversensitive, they would not in any way be disturbed or inconvenienced by what they consider to be a nuisance: *Harcourt v. Jamieson.* [245]

A farmer and an aviation company, hired by the farmer to do aerial spraying of his crops with insecticide, are both liable in nuisance to adjoining property owners whose property and persons were enveloped in mist. This, together with the noise from the lowflying aircraft, caused them fright

[243] 29 D.L.R.3d 1, at 27-28, 2 CELN 11 (S.C.C. 1972).
[244] *Supra* note 222.
[245] *Id.*

and nausea. The reaction of an ordinary person, disturbed by a threatening noise and enveloped in a toxic spray, must be one of fright, and hence nausea, although without actual poisoning, may reasonably follow. Nuisance is established where there is an interference, by noise or smell, with the amenities of living; no permanent loss or injury to health need be proved: *Newman v. Conair Aviation Ltd.* [246]

Vibrations from blasting: *Roy Judge Co. v. Norris.* [247]

The owner of a central air conditioning unit, so located as to emit sounds which cause a neighbouring resident to lose the enjoyment of her backyard for reading, relaxing and entertaining, may be guilty of the offence created by section 14 of the Ontario Environmental Protection Act of causing or permitting the emission of sounds which impair the quality of the natural environment for a use that may be made of it. Even upon a guilty plea to the above charge, and where the unit has been moved to a more suitable location prior to sentence, a nominal fine is not desirable; rather the accused should enter into a recognizance to keep the peace for six months: *Regina v. Lieberman.* [248]

The proper interpretation of a municipal anti-noise by-law which prohibits the discharge of "unnecessary noise which disturbs the inhabitants" requires that, if a piece of equipment can be operated reasonably efficiently while producing noises within acceptable limits, any noise produced by that equipment that is not within such limits would be unnecessary. Further "Inhabitants" for the purposes of the by-law include occupants of business premises: *Regina v. Teperman & Sons Ltd.* [249]

A charge against a telephone company for causing unnecessary noise contrary to a municipal anti-noise by-law is not proved when the utility shows that it was laying new cable under a major street on a Sunday to avoid causing traffic disruption and that it began to tear up the pavement because the cable became stuck in the conduit: *Regina v. Bell Canada.* [250]

A charge under a municipal anti-noise by-law which prohibits "any sound made by any animal or bird which disturbs the peace, quiet, comfort or repose of any individual in the neighbourhood" is made out when it is proved that the accused allowed to the annoyance of his neighbours, several small dogs to remain barking all night in his backyard: *Regina v. Smith.* [251]

H. *Pesticides*

On this topic, see *Newman v. Conair Aviation Ltd.*; [252] *Stein v. City of Winnipeg*; [253] *Maurice v. Township of Tiny.* [254]

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[246] *Supra* note 205.
[247] *Supra* note 219.
[248] 3 CELN 47 & 77 (Ont. Prov. Ct. 1974).
[249] 3 CELN 45 (Ont. County Ct. 1974).
[250] 2 CELN 16 (Ont. Prov. Ct. 1973).
[251] 2 CELN 90 (Ont. Prov. Ct. 1973).
[252] *Supra* note 205 (aerial spraying).
[253] *Supra* note 72 (methoxychlor).
[254] 2 CELN 22 (Ont. 1972) (potato crop damaged by roadside spray).

I. *Practice and Procedure*

1. *Summary Conviction Proceedings*

A summary conviction court cannot award costs against a successful informant or prosecutor: *Regina v. Adventure Charcoal Enterprises Ltd.* [255]

2. *Interlocutory Injunctions*

An application for an interlocutory injunction to close a municipal waste disposal site will be refused despite evidence of dangerous gases, rats, flies, dust storms, sea gulls and noise emanating from the site which bothered the plaintiffs, where the plaintiffs had delayed in bringing their action, where there appeared no clear evidence that they would suffer irreparable harm, and where there was no evidence of an alternative disposal site to serve 182,000 people: *Halliday v. Berrill.* [256]

A riparian owner bordering a lake is entitled to an interlocutory injunction restraining the holding of a speed-boat regatta on the lake, where there is a reasonable apprehension that the regatta would result in a diminution of the water quality. Financial commitments of the sponsors, including the local municipality, arising because of the regatta, do not, on the balance of convenience, justify the denying of the owner's application for an injunction: *Gauthier v. Naneff.* [257]

As to what constitutes irreparable harm to the Quebec environment and the principles upon which an interlocutory injunction ought to be granted in that province, see the judgment of Mr. Justice Malouf and the appeals therefrom: *Kanatewat v. The James Bay Development Corporation.* [258]

Where a statute imposes an obligation to undertake an environmental impact assessment, prior to commencement of a project likely to significantly affect the environment, failure to undertake the assessment is only one factor for the court to consider on an interlocutory application for an injunction to restrain the project. The court must still consider the balance of convenience: *Stein v. City of Winnipeg.* [259] (Chief Justice Freedman in *Stein* would have granted the injunction because the law had not been obeyed. He stated at 488: "A project launched without legal authority, indeed contrary to the express requirements of the law, should not be continued.")

J. *Water*

The prohibition of the discharge of deleterious substances under the Federal Fisheries Act [260] into waters which are frequented by fish does not

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[255] 1 CELN, No. 3, at 6 (Ont. High Ct. 1972).

[256] 1 CELN, No. 3, at 6 (Ont. High Ct. 1972).

[257] [1971] 1 Ont. 97, 14 D.L.R.3d 513 (High Ct. 1970).

[258] *Supra* note 235.

[259] *Supra* note 72.

[260] CAN. REV. STAT. c. F-14 (1970) *as amended by* Can. Stat. c. 17 (1st Supp.) (1970).

prohibit the deposit if the substance is harmful to fish eggs only; "fish" does not include fish eggs: *Regina v. Stearns-Roger Engineering Co.* [261]

The prohibition of having in possession, without lawful excuse, lobsters of a length less than the minimum specified in a schedule, contrary to section 3(1)(*b*) of the Lobster Fishery Regulation made pursuant to the Federal Fisheries Act is an absolute offence: *The Queen v. Pierce Fisheries Ltd.* [262]

The prohibition of the discharge of deleterious substances into waters frequented by fish contained in section 33(2) of the Federal Fisheries Act is an offence of strict liability of which mens rea is not an essential ingredient: *Regina v. Churchill Copper Corp.*; [263] and *Regina v. Jordan River Mines.* [264]

In a prosecution under section 5 of the Oil Pollution Prevention Regulations made pursuant to the Canada Shipping Act, [265] circumstantial evidence of the source of the oil being the accused vessel may in some circumstances be sufficient to convict the accused; a lack of any direct evidence will not prevent conviction: *Regina v. The Vessel Himmerland.* [266]

The offence of discharging oil pollutants, contrary to the above regulation under the Canada Shipping Act, is an absolute offence and mens rea is not an ingredient which the Crown must establish: *Regina v. The Vessel Himmerland*; [267] *but see Regina v. "M.V. Allunga"*. [268]

Section 32 of the Ontario Water Resources Act, [269] which makes it an offence for any person or municipality to discharge or permit the discharge of material of any kind into, in, or near, any water body "that may impair the quality of the water" creates "an absolute prohibition in the sense that to succeed, the Crown does not need to prove that the accused had knowledge, a guilty or criminal intent, or *mens rea*, whichever way one desires to express it.": *Regina v. Industrial Tankers Ltd.*; [270] and *Regina v. Sheridan.* [271]

Further, in a prosecution under the above section, the Crown need not prove beyond a reasonable doubt that the material did in fact impair, but rather that it had the ability to do so and might have done so: *Regina v. Matspeck Construction Co.*, [272] quoted with approval in *Regina v. Sheridan.* [273]

Nor does the Crown have to prove that the act was done with the knowledge of the accused, but merely that it was one which the accused had

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[261] 12 Can. Crim. Cas.2d 260, 37 D.L.R.3d 573, 2 CELN 77 (B.C.), *rev'g* [1973] 2 W.W.R. 669, 10 Can. Crim. Cas.2d 374 (B.C. Sup. Ct.).

[262] [1971] Sup. Ct. 5, 12 Can. Crim. (n.s.) 272, [1970] 5 Can. Crim. Cas. Ann. 193, 12 D.L.R.3d 591 (1970).

[263] 5 Can. Crim. Cas.2d 319 (B.C. Prov. Ct. 1971).

[264] [1974] 4 W.W.R. 337 (B.C. Prov. Ct. 1973).

[265] CAN. REV. STAT. c. S-9 (1970) *as amended by* CAN. REV. STAT. c. 27 (2nd Supp.) (1970).

[266] *Supra* note 218.

[267] *Id.*

[268] [1974] 4 W.W.R. 435 (B.C. Prov. Ct.).

[269] ONT. REV. STAT. c. 332 (1970).

[270] [1968] 2 Ont. 142, at 150 (Prov. Ct.).

[271] *Supra* note 153.

[272] [1965-66] 6 Crim. L.Q. 455, at 460 (Ont. Prov. Ct. 1965).

[273] *Supra* note 153.

the power and authority to prevent, but did not prevent: *Regina v. Sheridan.* [274]

And there is no onus on the Crown to prove that the quality of waters above the pollution source in question (or prior to the material being added) was unimpaired: *Regina v. Sheridan.* [275]

The offence of discharging effluent without a permit, contrary to section 20A of the British Columbia Pollution Control Act, [276] is an offence of strict liability: *Regina v. Isherwood* [277] and *Regina v. Jordan River Mines Ltd.* [278]

Riparian rights exist in the flow of artificial streams where the artificial condition has permanency and lower riparian owners have relied on its continuance. Thus where a person had a stream on his property which had been artificially diverted for 50 years to the adjoining owner's property, the latter is entitled to an injunction restraining the former from diverting the water back. Although the trial judge rested the injunction on a prescriptive easement to the flow, this was doubted by Mr. Justice Laskin who rested his decision on the latter owner's riparian rights: *Epstein v. Reymes.* [279] See also *Gauthier v. Naneff* [280] (injunction to prevent motorboat regatta).

Where the result of the defendant's blasting in the course of constructing a road was to open fissures in bedrock which allowed material in the barnyard of a neighbouring piggery to escape into the percolating water which fed the plaintiff's well, the defendant construction company is liable in nuisance for pollution of the plaintiff's water, even though no person has a proprietary right to percolating water. The right of one to appropriate the common source does not give the right to contaminate that source so as to prevent another from having the full value of his right of appropriation. It is not a defence that the damage did not come from the defendant's property; in a nuisance action liability attaches to anyone who either creates or causes a nuisance, and the cause of action is not dependent upon that person being in occupation of the premises from which the nuisance operates. It is sufficient that the defendant has caused or continued the nuisance if, by any act or omission on his part, he directly gave rise to it: *Jackson v. Drury Construction.* [281]

The owner of vacant urban land is under no duty to adjoining land owners to take positive steps to ensure that the surface water on his land which drains naturally towards his neighbours' lands does not run off to the possible injury of his neighbours, so long as he does nothing which materially increases or changes the direction of the flow. But where some type of barrier exists, even though non-natural, which prevents the water from flow-

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[274] *Id.*
[275] *Id.*
[276] B.C. Stat. 1956 c. 36.
[277] Unreported, Nov. 24, 1973, Victoria Provincial Ct., Ostler, J.
[278] *Supra* note 264.
[279] *Supra* note 243.
[280] *Supra* note 257.
[281] 3 CELN 43 (Ont. 1974).

ing onto neighbouring property, and the owner of the vacant lot removes that barrier, he may be liable for such of the damage caused by flooding as results from the barrier's removal, as the neighbour in some circumstances may have acquired an easement by prescription in having the barrier divert the water from his property: *Loring v. Brightwood Golf & Country Club Ltd.* [282]

Where the plaintiff's riparian rights to the normal flow of water in a brook have been interfered with by the defendant, an injunction may not be the proper remedy where the plaintiff's land was in an urban area and the brook (according to the court) was not a thing of value, but was simply part of the natural beauty of the property; damages were held to be the proper remedy: *Lockwood v. Brentwood Park Investments Ltd.* [283]

[282] 44 D.L.R.3d 161 (N.S. 1974).
[283] 10 D.L.R.3d 143 (N.S. 1970).