ENVIRONMENTAL LAW SURVEY (1980-92), PART I

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This paper, which will appear in two parts, surveys developments in the field of Canadian environmental law with emphasis on toxic substances and contaminated lands, environmental assessment, and the environmental responsibilities of individuals.

Cet article, qui paraîtra en deux parties, passe en revue l'actualité dans le domaine du droit de l'environnement au Canada, en insistant tout particulièrement sur les substances toxiques et les sols contaminés, les évaluations environnementales ainsi que les responsabilités des particuliers en matière d'environnement.

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I. INTRODUCTION: CHANGES IN THE LANDSCAPE

A short description of basic themes affecting the overall evolution of Canadian environmental law and policy during the 1980s can do little more than highlight a number of complex developments. This is helpful nonetheless as a context within which to consider more technical matters as well as the many new legislative initiatives which have been a focus of attention for environmental lawyers and policy-makers.

The principal contextual elements — if one were pressed to identify a short list — would include the following: major environmental incidents, domestic and international, along with accelerating resource depletion; general policy initiatives in the fields of economic regulation, international trade, and the constitution; shifts in understanding the global framework; critical assessment of the effectiveness of alternative responses to environmental deterioration; the intensified involvement by the legal profession, public interest groups and native communities in environmental decision-making and litigation; and the emergence of sustainability as a normative benchmark or standard.

After briefly outlining the significance of each of these influences, the paper surveys legal developments in three key areas: the response to toxic substances and contaminated lands; environmental impact assessment; the individual and the environment. The interplay between the contextual themes and the areas of environmental law discussed here will intrigue analysts for some time to come, as will the evolving relationship between the areas of law surveyed. The concluding section of the paper offers some reflections on these relationships and their possible future course. For reasons of length, discussion of the individual and the environment as well as the paper's conclusion will appear in the next issue of this journal.

A. *A Few Good Scares*

Internationally, the disasters at Bhophal and Chernobyl, followed by the grounding of the Exxon Valdez in Prince William Sound with the spillage of 38 million litres of crude oil, and the devastation of the Gulf War were very visible reminders of the continuing potential for tragic incidents of enormous significance for the environment and the human community.[1] These incidents and, as the decade unfolded, growing public awareness of the systematic destruction of forest lands on several continents as well as the toxic legacy spawned over decades in Eastern Europe and the former Soviet Union reinforced awareness of the inter-

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[1] *See, e.g.*, M. Galanter, *Bhopals, Past and Present: The Changing Legal Response to Mass Disaster* (1990) 10 WINDSOR Y.B. ACCESS JUST. 151; J. Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (1991) 29 OSGOODE HALL L.J. 1; Bhopal Aftermath Review Steering Committee, BHOPAL AFTERMATH REVIEW: AN ASSESSMENT OF THE CANADIAN SITUATION (Ottawa: Supply & Services Canada, 1986).

relationships between modern industrial practices and the global environment.

Acid rain remained on the Canadian agenda where it was joined by intensifying concern about greenhouse gases, global warming and ozone depletion.[2] Within Canada itself, tire fires, polychlorinated biphenal (PCB) spills, the derailment of trains transporting dangerous chemicals, clear-cutting and a renewed enthusiasm for dam building on northern rivers all served to sustain high levels of public concern. Both global and domestic environmental changes during the decade appeared to be increasingly personalized in terms of their impacts. Thus, urban beaches were frequently closed to swimmers and direct warnings from the federal Minister of the Environment and the Canadian Dermatological Association to take precautions in the sun drew attention to the extent of personal risk from global developments.[3] In a number of communities, spills and other incidents of contamination threatened drinking water supplies[4] while scientific studies linking environmental pollution to long-term human health impacts underlined the fact that if the environment was harmed, so were its occupants.[5] The Royal Commission on the Future of the Toronto Waterfront examined such considerations in the context of a major urban centre.[6] And, the *Canadian Environmental Protection Act* (*CEPA*),[7] the federal government's principal environmental legislation of the 1980s, made continuing provision for joint administration by health as well as environment officials.

B. *The Policy Context*

Incidents such as those mentioned above and the public awareness they stimulated focused the attention of legislators and administrators

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[2] N.D. Bankes & J.O. Saunders, *Acid Rain: Multilateral and Bilateral Approaches to Transboundary Pollution Under International Law* (1984) 33 U.N.B.L.J. 155; N. Bankes, *Legal Prescriptions for an Atmosphere That Will Sustain the Earth* in J.O. Saunders, ed., THE LEGAL CHALLENGE OF SUSTAINABLE DEVELOPMENT (Calgary: Canadian Institute of Resources Law, 1990) 155.

[3] R. Matas, "Radical new behaviour needed to prevent skin cancer, doctors say" *The [Toronto] Globe and Mail* (12 February 1992) A1.

[4] *See generally* M. Keating, TO THE LAST DROP: CANADA AND THE WORLD'S WATER CRISIS (Toronto: Macmillan of Canada, 1986); D. MacDonald, THE POLITICS OF POLLUTION (Toronto: McClelland & Stewart, 1991) at 111-14.

[5] The International Joint Commission on the Great Lakes (IJC)'s reports on the condition of the Great Lakes have examined the relationship of environmental contamination to human health: *see* R. Spencer, J. Kirton & K.R. Nossal, THE INTERNATIONAL JOINT COMMISSION SEVENTY YEARS ON (Toronto: Centre for International Studies, 1981); International Joint Commission, FIFTH BIENNIAL REPORT UNDER THE GREAT LAKES WATER QUALITY AGREEMENT OF 1978, PART II (1990); *see also* Health and Welfare Canada, A VITAL LINK: HEALTH AND THE ENVIRONMENT IN CANADA (Ottawa: Supply & Services Canada, 1992).

[6] Royal Commission on the Future of the Toronto Waterfront Environment and Health Work Group, ENVIRONMENT AND HEALTH: ISSUES ON THE TORONTO WATERFRONT (Ottawa: Supply & Services Canada, 1988).

[7] R.S.C. 1985 (4th Supp.) c. 16 [hereinafter *CEPA*].

on the environment as a field of continuing, perhaps growing, importance. However, the broader policy context in which environmental affairs were to be managed was also undergoing transformation as a consequence of other major developments. In Canada, environmental initiatives could not be isolated from the influence of debates relating to regulatory reform in general, international trade and the economy, and the Constitution. Indeed, in 1989 the Prime Minister established a ten member cabinet committee on the environment to manage the relationship between his administration's environmental objectives and other government policies and programs.[8]

1. *Regulatory Reform and the Market*

The U.S. experience with regulatory reform profoundly altered the general context of policy-making in that country. Although regulatory reform, broadly conceived, encompasses a range of possible initiatives, the American emphasis in the Reagan era appeared to be centred on deregulation, that is, the rolling back and elimination of direct governmental intervention, especially its more coercive manifestations. Canadians, through such federal initiatives as the Regulation Reference of the Economic Council of Canada and the Nielson Task Force on Program Review,[9] undertook wide-ranging inquiries into the operation and effectiveness of the existing regulatory framework and process. As Peter Nemetz explained: "The increasing pressure for deregulation in the United States and the concern for issues of economic efficiency have prompted a more sophisticated analysis of the costs and benefits which accrue from alternative environmental control strategies."[10] Quebec, for example, introduced procedures for the economic evaluation of regulations in 1981, applying these to new environmental regulations and to those developed during the 1970s.[11] Although not all commentators considered the deregulation impulse to be appropriate in the environmental field the debate had to be engaged.[12]

Regulatory reform has continued to exercise an important influence, ultimately encouraging what one observer has described as "the

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[8] Prime Minister's Office, Press Release "Background Paper on the New Cabinet Decision - Making System" (30 January 1989).

[9] Task Force on Program Review, ENVIRONMENTAL QUALITY: STRATEGIC REVIEW: A FOLLOW-ON REPORT (Ottawa: Supply & Services Canada, 1986).

[10] P.N. Nemetz, *Federal Environmental Regulation in Canada* (1986) 26 NATURAL RESOURCES J. 551 at 605.

[11] C. Sauvé, *Quebec's Experience with the Economic Evaluation of Environmental Regulations: What Lessons Have Been Learned* in Ontario Ministry of the Environment, PROCEEDINGS: TECHNOLOGY TRANSFER CONFERENCE (Part E, Environmental Economics) (Toronto: Ministry of the Environment, December 1986) 65.

[12] *See* Royal Commission on the Economic Union and Development Prospects for Canada, REPORT (Ottawa: Supply & Services Canada, 1985) v. II, 527 for resistance to deregulation in the environmental context, and *see* R. Howse, J.R.S. Prichard & M.J. Trebilcock *Smaller or Smarter Government?* (1990) 40 U.T.L.J. 498 for an overview of incentive-oriented policy instruments.

abdication by the government of what have been viewed traditionally as its appropriate responsibilities of delivering public goods and services."[13] As David Cohen summarized the critique, neo-conservative analysts suspected or presumed that government ineffectiveness in the delivery of private goods might correspond to equivalent deficiencies in the provision of public goods. "Why" some analysts asked, "should penal institutions be public? Why should health care facilities be public? Why should water and sewage facilities be public? And....why should environmental regulation and the delivery of environmental benefits be public?"[14] This line of thinking supported the introduction of new approaches to the environment, including greater use of market-based instruments such as emission rights.[15] Companies licensed to export Canadian water in bulk proliferated with the shares of at least one, Western Canada Water Enterprises Ltd., trading on the Toronto Stock Exchange.[16]

Economic considerations affected environmental activity in other ways as well. Thus, economic restraint and early efforts on the part of the Conservative government after the 1984 election to address the federal deficit resulted in cutbacks for environmental agencies, notably a reduction of almost 25% to the Canadian Wildlife Service budget.[17]

2. *International Trade*

Profound shifts in Canadian trade policy whose impacts are still being assessed altered the context within which legislative initiatives relating to the environment were developed.[18] Although fundamental environmental issues were raised during the course of the Canada-U.S.

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[13] D.S. Cohen, *The Regulation of Green Advertising: The State, the Market and the Environmental Good* (1991) 25 U.B.C. L. REV. 225 at 228.

[14] *Ibid.*

[15] Legislation such as the Manitoba *Environment Act*, S.M. 1987-88, c. 26, s. 45, C.C.S.M. E125, s. 45 authorized the sale of emission rights for designated pollutants:

> The Lieutenant Governor in Council may, where it is consistent with established environmental quality objectives, market units of allowable emission of specific pollutants, in accordance with the regulations, and the revenue so generated may be held in trust by the Minister of Finance as an environmental contingency fund, to be used at the request of the minister in the event of an environmental emergency.

[16] "New TSE listing a first for fresh water exporters" *The [Toronto] Globe and Mail* (15 February 1991) B11.

[17] POLITICS OF POLLUTION, *supra*, note 4 at 119-20. The Canadian Environmental Advisory Council was a later casualty of a continuing effort to control federal expenditures in the context of declining revenues.

[18] J.O. Saunders, *Legal Aspects of Trade and Sustainable Development* in Saunders, ed., *supra*, note 2, 370.

free trade negotiations, they received comparatively modest attention.[19] The free traders' vision of environmental protection measures as potential barriers to trade or "green tariffs" effectively marginalized the environmental dimensions of the Canada-U.S. agreement. Similarly, the initial public perception of environmental protection as a potential threat to international competitiveness and productivity often served to subordinate environmental matters on the overall public agenda. For their part, environmentalists generally expressed considerable scepticism over the ecological implications of economically open borders even though some analysts suggest that Canadian environmental practices may have been strengthened by pressure to move towards U.S. standards.[20]

In the aftermath of the 1988 Canada-U.S. trade agreement a number of environmental irritants arose, among them water exports,[21] pesticide regulation,[22] beer cans and the destruction of bison in Wood Buffalo National Park.[23] Then, as the North American Free Trade Agreement (NAFTA) talks got underway Mexico's environmental controls and enforcement practices aroused concern within Canada as they did in the United States.[24] Yet despite the pace of the NAFTA negotiations, information limitations, and the remarkable lack of public consultation in comparison with the Canada-U.S. agreement, environmental concerns were addressed more openly and systematically in the NAFTA process.[25]

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[19] Canadian Environmental Advisory Council, FREE TRADE AND THE ENVIRONMENT (Ottawa: Minister of Supply & Services Canada, 1986); S. Shrybman, SELLING CANADA'S ENVIRONMENT SHORT: THE ENVIRONMENTAL CASE AGAINST THE TRADE DEAL (Toronto: Canadian Environmental Law Association, 1988).

[20] G. Hoberg, *Governing the Commons: Environmental Policy in Canada and the United States* forthcoming in R. Simeon & K. Banting, eds., CANADA AND THE UNITED STATES IN A CHANGING WORLD [not yet published].

[21] A. Scott, J. Olynyk & S. Renzetti, *The Design of Water-Export Policy* in J. Whalley, Research Coordinator, CANADA'S RESOURCE INDUSTRIES AND WATER EXPORT POLICY (Toronto: University of Toronto Press, 1986) 161; J.O. Saunders, *A Legal Perspective on Water Exports* in W. Holm ed., WATER AND FREE TRADE (Toronto: James Lorimer & Co., 1988).

[22] D. Tingley, *Responding to the Challenge: An Overview of Significant Trends in Government Regulation* in D. Tingley, ed., INTO THE FUTURE: ENVIRONMENTAL LAW AND POLICY FOR THE 1990'S (Edmonton: Environmental Law Centre (Alberta) Society, 1990) 11 at 19.

[23] E. Struzik, "The Last Buffalo Slaughter" 69 *The Canadian Forum* (November 1990) 6; *see also* D. Munton & G. Castle, *Air, Water, and Political Fire: Building a North American Environmental Regime* in A.C. Cutler & M.W. Zacher, eds., CANADIAN FOREIGN POLICY AND INTERNATIONAL ECONOMIC REGIMES (Vancouver: UBC Press, 1992) 311; *see* M. Swenarchuk, *The Environmental Community's Perspective* in J. Kirton & S. Richardson, eds., TRADE, ENVIRONMENT AND COMPETITIVENESS: SUSTAINING CANADA'S PROPERTY (Ottawa: National Round Table on the Environment and the Economy, 1992) 67.

[24] E.B. Weiss, *An U.S. Perspective on the North American Free Trade Agreement and the Environment* (1992) 18 CAN.-U.S.L.J. 199.

[25] Canadian Environmental Review, *North American Free Trade Agreement* (October 1992); TRADE, ENVIRONMENT AND COMPETITIVENESS, *supra*, note 23; M. Hart & S. Gera, *Trade and the Environment: Dialogue of the Deaf or Scope for Cooperation?* (1992) 18 CAN.-U.S. L.J. 207.

Also on the trade front, official enthusiasm for promoting the manufacture and export of Canadian environmental technology began to emerge as a distinctive influence on environmental policy during the second half of the 1980s. Recent estimates suggest that the existence of some $250 billion worth of economic activity around the world can be attributed to the environmental industry with some $7 billion in Canada. A definition of the industry was formulated[26] and trade fairs such as "Globe '90" hosted by Environment Canada in Vancouver served to display business opportunities in the environmental field.[27]

3. *The Constitutional Agenda*

From patriation, through the *Charter*[28] debate to Meech Lake, Canadian constitutional reform was an almost incessant pre-occupation of the 1980s. For much of this period environmentalists seemed largely unconcerned. The section 92a amendment to the *Constitution Act, 1867* addressed uncertainty regarding federal and provincial roles in relation to the development, conservation and management of non-renewable and forestry resources as well as electrical energy production sites, but with few other exceptions, analysis of constitutional alternatives from an environmental perspective was rare.[29]

Environmental cases raising federalism issues in the Supreme Court of Canada secured a respectable level of professional coverage.[30] In light of the extraordinary federal-provincial sensitivities publicly revealed by such episodes as the Rafferty-Alameda, Oldman and James Bay II dam projects, the general disregard of constitutional opportunities to advance environmental protection in Canada may well have been appreciated by constitutional negotiators. As a consequence, even the post-Meech round of proposals has not resulted in much prominence being given to the

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[26] Industry, Science, Technology Canada refers to the industry as providing "products and services which have as their effect the conservation, protection, and enhancement of the environment." Quoted in M.P. Brown, *Target or Participant?* in Boardman, ed., *infra*, note 27, 164 at 166.

[27] Environment Canada, ANNUAL REPORT 1989-90 (Ottawa: Supply & Services Canada, 1990) at 4; M.P. Brown, *Target or Participant? The Hatching of Environmental Industry Policy* in R. Boardman, ed., CANADIAN ENVIRONMENTAL POLICY: ECOSYSTEMS, POLITICS, AND PROCESS (Toronto: Oxford University Press, 1992) 164.

[28] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[29] D. Gibson, *Constitutional Arrangements for Environmental Protection and Enhancement under a New Canadian Constitution* in S.M. Beck & I. Bernier, eds., CANADA AND THE NEW CONSTITUTION: THE UNFINISHED AGENDA (Montreal: Institute for Research on Public Policy, 1983) 113; C.P. Stevenson, *A New Perspective on Environmental Rights After the Charter* (1983) 21 OSGOODE HALL L.J. 390.

[30] A.R. Lucas, *Constitutional Law — Federal Fisheries Power - Provincial Resource Management and Property and Civil Rights Powers* — Fowler *v.* The Queen *and* Northwest Falling Contractors Limited *v.* The Queen (1982) 16 U.B.C. L. REV. 145; A.R. Lucas, *Case Comment on* R. *v.* Crown Zellerbach Ltd (1989) 23 U.B.C. L. REV. 355.

environment. However, a new and important development is the very recent focus of expert commentary on the linkages between environmental and constitutional questions. These linkages have been addressed in some litigation and have been examined in conference proceedings, scholarly writing, and presentations to various constitutional committees.[31]

Arguably the pivotal experience for arousing environmentalist interest in the distribution of powers was the *CEPA* process in the mid-1980s which Donna Tingley has dubbed "the beginning of disillusionment."[32] Rod Northey's assessment of the *CEPA* episode was simply that "Canadian federalism limits virtually all major environmental reforms proposed by the federal government."[33]

On the practical front, governments continued to address the interjurisdictional complexities of Canadian federalism and the environment through a variety of established techniques.[34] Whether or not one subscribes to a cooperative or competitive interpretation of effective federalism, some satisfaction may be taken from the announcement of the St. Lawrence Action Plan and the signing of a Canada-Quebec agreement to advance the clean-up of a waterway whose scandalous condition has

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[31] N. Duplé, LE DROIT À LA QUALITÉ DE L'ENVIRONNEMENT: UN DROIT EN DEVENIR UN DROIT À DÉFINIR, VE CONFÉRENCE INTERNATIONALE DE DROIT CONSTITUTIONNEL (Montréal: Éditions Québec/Amérique, 1988); H.S. Fairley, *The Environment, Sustainable Development and the Limits of Constitutional Jurisdiction* in Canadian Bar Association Sustainable Development Committee, SUSTAINABLE DEVELOPMENT IN CANADA: OPTIONS FOR LAW REFORM (Ottawa: The Canadian Bar Association, 1990) 55; M.H. Ogilvie, *The Constitutionality of Provincial Regulation of the Environmental Liability of Banks as Secured Lenders in Canada* (1993) 21 CAN. BUS. L.J. 429.

[32] D. Tingley, *Conflict and Cooperation on the Environment* in D.M. Brown, ed., CANADA: THE STATE OF THE FEDERATION, 1991 (Kingston: Institute of Intergovernmental Relations, 1991) 131 at 140.

[33] R. Northey, *Federalism and Comprehensive Environmental Reform: Seeing Beyond the Murky Medium* (1991) 29 OSGOODE HALL L.J. 127 at 128; *see also* A.R. Lucas, *The New Environmental Law* in R.L. Watts & D.M. Brown, eds., CANADA: THE STATE OF THE FEDERATION, 1989 (Kingston: Institute of Intergovernmental Relations, 1989) 167; E.J. Swanson & E.L. Hughes, PRICE OF POLLUTION: ENVIRONMENTAL LITIGATION IN CANADA (Edmonton: Environmental Law Centre (Alberta) Society, 1990) 95-119; D. Vanderzwaag & L. Duncan, *Canada and Environmental Protection: Confident Political Faces, Uncertain Legal Hands* in Boardman, ed., *supra*, note 27, 3; D. Tingley, ed., ENVIRONMENTAL PROTECTION AND THE CANADIAN CONSTITUTION (Edmonton: Environmental Law Centre (Alberta) Society, 1981); N. Bankes, *Shaping the Future or Meeting the Challenge? The Federal Constitutional Proposals and Global Warming* (1991) 36 RESOURCES 1; Gibson, *supra*, note 29; Canadian Labour Congress Environment Committee, THE ENVIRONMENT AND THE CANADIAN CONSTITUTION (Ottawa: Canadian Labour Congress Environment Bureau, 1991); the "Special Report on the Environment and the Constitution", 18:4 *Alternatives: Perspectives on Society, Technology and Environment* (May/June 1992); M. Walters, *Ecological Unity and Political Fragmentation: The Implications of the Bruntland Report for the Canadian Constitutional Order* (1991) 29 ALTA L. REV. 420.

[34] *See* contributions by D. Estrin, W.A. Neff, D.A. Davis, T. Mill, L. Giroux & J.Z. Swaigen, in D. Tingley ed., *ibid.*

drawn criticism for many years.[35] Interjurisdictional relations continue to influence ongoing attempts to address the management and rehabilitation of the Fraser River.[36] Despite such measures, reform of federal environmental assessment confirmed the persistence of serious intergovernmental friction over environmental matters.

Although environmental issues figured only to a limited degree in the outpouring of *Charter* litigation, several important developments occurred, including an early demonstration of judicial willingness to examine or review high level public decision-making where environmental considerations might arise.[37] Litigation having the potential to constrain the enforcement of existing regulatory provisions — including environmental regulation — on *Charter* grounds was closely scrutinized.[38] The potential for friction between environmental values and *Charter* protections is suggested by Diane Saxe's scathing critique of the Ontario Court of Appeal's decision in *Ellis Don*[39] on the *Charter* and reverse onus with respect to due diligence:

> The majority's decision in *Ellis-Don* is defensible only if the presumption of innocence is so fundamental to our society that no incursion on it can ever be tolerated regardless of the opposing interest. Legal processes are means to an end: the recognition and promotion of human life and dignity. Sacrificing human life and health to a legal abstraction, as this decision does, confuses the means with their end.[40]

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[35] ANNUAL REPORT 1989-90, *supra*, note 27 at 11; as reported by L. Giroux: "studies of water quality of the St. Lawrence reveal a number of land-based sources of continuous discharge of highly toxic substances which seem to enjoy complete immunity from prosecution", *Delegation of Administration* in Tingley, *supra*, note 32, 84 at 90. Amidst criticism of the limited impact of the federal-provincial program as opposed to discharge reductions brought about by the recession, the federal government committed an additional $100 million to extend the clean-up effort. A. Picard, "Critics unimpressed with St. Lawrence cleanup" *The [Toronto] Globe and Mail*, (3 April 1993) A5A.

[36] Environment Canada, FRASER RIVER ACTION PLAN 1991-92 PROGRESS REPORT (Vancouver: Environment Canada, May 1992). The Government of Canada, Government of British Columbia & Municipalities and Regional Districts are signatories to the Agreement Respecting the Fraser River Management Program (26 May 1992).

[37] *Operation Dismantle Ltd* v. *R.*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481.

[38] E.L. Hughes, *Environmental Prosecutions: Characterizing the Offence* (1991) 1 J. ENVTL. L. PRAC. 323; D. Shand, J. Adams & J. Bobechko, *Case Comment on* R. *v.* Weil's Food Processing 6 C.E.L.R. (N.S.) 245; W.A. Tilleman, *Due Diligence Defence in Canada for Hazardous Clean-up and Related Problems: Comparison with the American Superfund Law* (1991) 1 J. ENVTL. L. PRAC. 179; N. Finkelstein & M. Finkelstein, CONSTITUTIONAL RIGHTS IN THE INVESTIGATIVE PROCESS (Markham, Ont.: Butterworths, 1991); A. Brudner, *Imprisonment and Strict Liability* (1990) 40 U.T.L.J. 738; K.R. Webb, *Regulatory Offences, the Mental Element and the* Charter*: Rough Road Ahead* (1989) 21 OTTAWA L. REV. 419.

[39] *R.* v. *Ellis-Don Ltd* (1990), 1 O.R. (3d) 193, 76 D.L.R. (4th) 347 (C.A.) [hereinafter *Ellis-Don*].

[40] D. Saxe, *Due Diligence: Reasonable Doubt Test Reaffirmed* (1991) 2:3 ENVTL. L. ALERT 1 at 2.

The accused's onus regarding environmental due diligence, as John Swaigen observed in this journal over a decade ago, has clearly been a point of controversy,[41] even if a strict liability regulatory offence with the possibility of imprisonment ultimately survived a *Charter*-based attack.[42] Important differences in the line of reasoning followed by various members of the Supreme Court of Canada in *Wholesale Travel* suggest, though, that the relationship between criminal law principles and regulatory offences remains a sensitive one.

As elements of the new *Charter* requirements progressed through the courts, Robert Gibson described the synthesis desired by environmentalists as "a new agenda combining individual rights with government responsibilities in a way that recognizes community values and ecosystem realities, and provides effective tools for pursuing sustainability."[43] This reconciliation of the status of human communities and the autonomy of their individual members with environmental interdependence will continue to present interesting challenges.

4. *Global Perspectives*

The frame of reference for many fundamental debates about environmental management was transformed by widespread recognition of the global dimensions of problems which had previously been perceived as exclusively domestic responsibilities.[44] Environmental damage outside Canada was recognized as a potential source of domestic concern and some suggestion was made to include environmental deterioration along with other "unconventional threats" on the national security agenda.[45] The prospect of environmental refugees, for example, began to receive consideration.[46] Apart from such issues, developments in

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[41] J. Swaigen, *Environmental Law 1975-1980* (1980) 12 OTTAWA L. REV. 439 at 465.

[42] *R.* v. *Wholesale Travel*, [1991] 3 S.C.R. 154, 67 C.C.C. (3d) 193 [hereinafter *Wholesale Travel*].

[43] R. Gibson, "Editorial" 18:4 *Alternatives: Perspectives on Society, Technology and Environment* (1992) 1.

[44] R.W. Hahn & K.R. Richards, *The Internationalization of Environmental Regulation* (1989) 30 HARV. INT'L L.J. 421; V. KOESTER, *From Stockholm to Brundtland* (1990) 20 E.P.L. 14.

[45] Unconventional threats to security arise from the non-military activities of individuals and groups in society, or from changes in the stocks and flows of resources available to groups or nation-states. They are often cumulative, and usually are not perceived as threats to security, at least initially. Examples include: religious fundamentalist....human rights abuses....and the environment.

S. Lonergan, "Redefining Security", 3:2 *Delta* (Newsletter of the Canadian Global Change Program) (1992) 8.

[46] For a thoughtful critique of the suggestion that the environment is a matter for the national security agenda, *see* D. Deudney, *The Mirage of Eco-War: The Weak Relationship among Global Environmental Change, National Security and Interstate Violence* in I.H. Rowlands & M. Greene, eds., GLOBAL ENVIRONMENTAL CHANGE AND INTERNATIONAL RELATIONS (London: Macmillan Academic, 1992) 169; *see also* L.C. Green, *The Environment and the Law of Conventional Warfare* (1991) XXIX CAN. Y.B. INT'L L. 222.

international law and institutions provided benchmarks for Canadian performance, although Canadian leadership in the field of environmental protection — perhaps a holdover from the Stockholm conference — was often assumed. However, the early track record was sometimes used to encourage further effort rather than as an excuse for complacency. Thus, the Royal Commission on the Economic Union and Development Prospects for Canada observed:

> As a prosperous nation that occupies an extensive portion of the earth's surface, Canada has a major responsibility in many areas of environmental concern. Because the effects of human activity on the global environment are often cumulative and long-term, and because so many causes of environmental damage and degradation operate across national boundaries, this responsibility extends beyond the life of the present generation and beyond the boundaries of our own vast land. The measure of our civilization will be determined in no small part by the extent to which we live up to our responsibility at home and continue to offer assistance and leadership abroad.[47]

Negotiations leading to several significant treaties and protocols involved extensive Canadian participation and serious domestic consideration, but they revealed as well that many other countries had made important advances in attempting to address environmental issues. Major international initiatives including the World Commission on Environment and Development (WCED, the Brundtland Commission) and later the Rio conference absorbed enormous energy on the part of Canadian participants. They contributed to a re-conceptualization of environmental decision-making in a more comprehensive framework of economic development, international institutions and ecological sustainability. As the WCED report, OUR COMMON FUTURE, explained:

> Reforms at an international level are now needed to deal simultaneously with economic and ecological aspects in ways that allow the world economy to stimulate the growth of developing countries while giving greater weight to environmental concerns. Such an agenda requires deep commitment by all countries to the satisfactory working of multilateral institutions, such as multilateral development banks; to the making and observance of international rules in fields such as trade and investment; and to constructive dialogue on the many issues where national interests do not immediately coincide but where negotiation could help reconcile them.[48]

The influence of such considerations came to be reflected in the terms of the Montreal Protocol on substances that deplete the ozone layer and in other contexts.

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[47] REPORT, *supra*, note 12 at 508.

[48] World Commission on Environment and Development, OUR COMMON FUTURE (Oxford: Oxford University Press, 1987) 90 [hereinafter *Brundtland Report*].

Having introduced environmental considerations into its decision-making calculus as recently as 1983, the Canadian International Development Agency assisted with the formation and financing of the WCED and, in 1986, announced new policy on the relationship of environment and development. As the decade drew to a close, the agency's charter on Official Development Assistance reaffirmed the importance of environmental impacts to project assessment in the broader context of sustainability.[49]

An increasingly important development was that Canada's domestic environmental record came under scrutiny from external observers who were not always impressed with the performance level. Canadian rivers threatened by development such as the Great Whale and Tatshenshini, cutting practices in the domestic forest industry and depletion of fish and wildlife resources were subjects of concern for an international audience. This scrutiny, along with more systematic and comparative assessments by agencies such as the Organization for Economic Co-operation and Development (OECD), indicated that Canada's domestic environmental record was becoming a matter of wider interest in the international community.[50] International pressure and expectations thus joined the list of factors influencing Canadian policy in the environmental arena. Although the international initiatives did not gain force early enough to affect significantly the regulatory reform, trade and constitutional agendas which were already established early in the 1980s, the influence of international commitments could be seen in subsequent legislative developments at the federal and provincial levels.

C. *Assessing Environmental Law*

Coinciding with exploration of the relationship of environmental law to policy developments in other fields during the 1980s, was a vastly increased interest in the effectiveness of environmental initiatives themselves. Steps taken to assess the state of the environment were, in general, directed to the question "how are we doing" with a view to establishing baselines from which it might be possible to determine whether we are doing better or worse over time. On one hand, this increased the importance of data and "state of the environment" reporting;[51] on the

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[49] Canadian International Development Agency, ENVIRONMENT AND DEVELOPMENT: THE POLICY OF THE CANADIAN INTERNATIONAL DEVELOPMENT AGENCY (Hull, Que.: Canadian International Development Agency, 1987); *see generally* F. Bregha, *Aid and the Environment: The Canadian Approach* in Saunders, ed., *supra*, note 2, 325.

[50] *See* Organization for Economic Co-operation and Development, *The State of the Environment 1985*, Paris, 1985; and Organization for Economic Co-operation and Development, *Environmental Data: Compendium, 1985*, Paris, 1985.

[51] Saskatchewan's *The State of the Environment Report Act*, S.S. 1990-91, c. S-57.1, s. 3(1) requires the Minister to "annually prepare a report, to be known as the State of the Environment Report, with respect to the current condition of the environment in Saskatchewan and the relationship between the condition of the environment and the economy of Saskatchewan."

other the direct focus was the practical effect of legislative and policy initiatives. One commentator, responding to a question about how it might be determined whether the new *CEPA* was achieving its objectives, even stated bluntly, "[i]f we cannot answer that question in advance, we should not be legislating."[52]

Interest in results was accompanied by a more systematic curiosity about the utility of various alternative responses or instruments. How effective were they? Did some work better than others? And, in the context of serious cost concerns, persistent deficits and accumulated debts, there was an interest in the efficiency of various instruments: were some environmental initiatives costing more than the resulting benefits were worth? This latter line of inquiry, of course, represented the influence of the broader deregulation discussion on environmental policy-making.

One element of this process of evaluation was centred on enforcement and compliance strategies. Tom Conway who argued the importance of "taking stock" was struck by "the paucity of literature and data." Despite twenty years of effort on the environmental front, he concluded that "we still know very little about the policy and implementation record. Data on monitoring, testing, enforcement, costs and benefits, natural stock, and so on, remains thin or, where available, extremely unreliable and user unfriendly."[53]

The assessment initiatives took many forms over the decade ranging from purely conceptual to empirical.[54] Federal authorities embarked upon wide-ranging inquiries into the operation of compliance and regulatory strategies,[55] while the Law Reform Commission of Canada — before its demise — examined criminalization and sentencing, among other aspects of environmental law.[56] These efforts contributed to a

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[52] A. Campbell, *Regulatory Reform – Deregulation* in Tingley, ed., *supra*, note 33, 120 at 122.

[53] T. Conway, *Taking Stock of the Traditional Regulatory Approach* in G.B. Doern, ed., GETTING IT GREEN: CASE STUDIES IN CANADIAN ENVIRONMENTAL REGULATION (Toronto: C.D. Howe Institute, 1990) 25 at 26; *see also* Nemetz, *supra*, note 10.

[54] Comparatively early work included M. Rankin & P. Finkle, *The Enforcement of Environmental Law: Taking the Environment Seriously* (1983) 17 U.B.C. L. REV. 35; and L.F. Duncan, ed., ENVIRONMENTAL ENFORCEMENT: PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE ENFORCEMENT OF ENVIRONMENTAL LAW, (Edmonton: Environmental Law Centre, 1985).

[55] *See, e.g.*, L.S. Fairbairn & M. Prabhu, *Consultation Seminar on Responses to Non-Compliance with Legal Standards* May, 1988.

[56] Law Reform Commission of Canada, *Crimes Against the Environment* (Working Paper No. 44) (Ottawa: Law Reform Commission of Canada, 1985); Law Reform Commission of Canada, *Sentencing in Environmental Cases* by J. Swaigen & G. Bunt (Ottawa: Law Reform Commission of Canada, 1985); Law Reform Commission of Canada, *Pollution Control in Canada: The Regulatory Approach in the 1980s* by K. Webb, (Ottawa: Law Reform Commission of Canada, 1988).

thoughtful and prolonged debate on the use of criminal sanctions for environmental damage.[57]

Some analysts critically argued that a lack of resources, together with the cordial nature of relations between environmental regulators and industry, produced a marked tendency in favour of a conciliatory approach minimizing coercion. Certainly, the plausibility and attractiveness of a conciliatory approach had been carefully explored in Hawkins' influential study, ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION.[58] Nevertheless, critics lamented that "close agency-industry relationship has created, and continues to create, a degree of reluctance on the part of regulatory officials to take a tough negotiating position in attempting to establish and enforce environmental standards." It was also argued that "government has avoided coercive methods of implementing policies, such as legislation, in favour of less coercive methods, such as tax incentives or other fiscal measures."[59]

Despite such criticism, the potential penalties for a range of environmental offences were significantly increased and varied during the decade.[60] Enforcement efforts, described at the outset of the decade as "pitifully small",[61] were strengthened in several jurisdictions, though not necessarily to the satisfaction of all observers.[62] Again, commentators

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[57] P.M. Johnson, *Réflexion éthique sur la responsabilité pénale des dirigeants d'entreprises en matière de dommages écologiques* in Faculty of Law, McGill University, MEREDITH MEMORIAL LECTURES 1990 (Cowansville, Que: Yvon Blais, 1991) 257; J.D. Wilson, *Re-thinking Penalties for Corporate Environmental Offenders: A View of the Law Reform Commission of Canada's Sentencing in Environmental Cases* (1986) 31 MCGILL L.J. 313; D. Chappell & R.D. Moore, THE USE OF CRIMINAL PENALTIES FOR POLLUTION OF THE ENVIRONMENT: A SELECTIVE AND ANNOTATED BIBLIOGRAPHY OF THE LITERATURE (Ottawa: Department of Justice, 1989); D. Chappell, FROM SAWDUST TO TOXIC BLOBS: A CONSIDERATION OF SANCTIONING STRATEGIES TO COMBAT POLLUTION IN CANADA (Ottawa, Department of Justice, 1989); D.W. Boivin, *La criminalisation de la pollution environnementale* (1991) 20 MANITOBA L.J. 625; M.I. Jeffery, *Environmental Enforcement and Regulation in the 1980s: R. v.* Sault Ste. Marie *Revisited*, (1985) 10 QUEENS L.J. 43.

[58] K. Hawkins, ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION (Oxford: Clarendon Press, 1984).

[59] E.L. Hughes, *Government Response to Environmental Issues: Institutional Inadequacies and Capacity for Change* (1991) 1 J.E.L.P. 51 at 53.

[60] *See generally* H. Poch, CORPORATE AND MUNICIPAL ENVIRONMENTAL LAW (Toronto: Carswell, 1989) pp. 35-81.

[61] Swaigen, *supra*, note 41 at 488.

[62] L. Giroux, *A Statement by the Canadian Environmental Advisory Council on Enforcement Practices of Environment Canada* (Ottawa: Canadian Environmental Advisory Council, 1987); Alberta Review Panel on Environmental Law Enforcement cited by B. Evans, *Environmental Law Enforcement* in INTO THE FUTURE, *supra*, note 22, 46 at 47; CEPA *Enforcement and Compliance Strategy* (Ottawa, 1988). *See* J. Swaigen, *Ontario's Environment Enforcement Statute Law Amendment Act, 1986* 2 C.E.L.R. (N.S.) 14 at 17:

> Together with an expanded capability of detecting violations through the formation of an investigations and enforcement branch in 1985, a Ministry policy favouring the use of prosecutions in appropriate circumstances, the expansion of the Ministry's legal services branch, and the training of pollution abatement inspectors in the collection of evidence and the preparation of Court cases, the new sentencing provisions should act as a substantial deterrent to violations of Ontario's environmental legislation.

have attempted to evaluate the impact and effectiveness of more vigorous enforcement efforts.[63] In one case study, the preference of British Columbia waste management officials for a persuasive rather than coercive approach to enforcement appeared ineffective in comparison with the tougher approach adopted by workers compensation officials against many of the same firms.[64] Refinements in a coercive strategy, such as directing the limited resources available for enforcement towards sectors such as the pulp and paper industry where violations appeared to entail more serious environmental damage, have also been introduced.[65]

The effectiveness of established regulatory standards increasingly came under scrutiny as well, as researchers endeavoured to determine what environmental progress, if any, could be attributed to traditional command and control methods.[66] In the context of uncertainty about the effectiveness of earlier regulatory efforts, alternatives such as contract-based environmental protection systems were also more systematically explored.[67]

In addition to the instruments noted above, there was a tendency to resort to alternative dispute resolution (ADR), including mediation,

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[63] *See, e.g.*, D. Saxe, *The impact of prosecution of corporations and their officers and directors upon regulatory compliance by the corporation* (1991) 1 J.E.L.P. at 91; J. Swaigen, *The Role of the Civil Courts in Resolving Risk and Uncertainty in Environment Law* (1991) 1 J.E.L.P. 199 at 206-07; B. Evans, *Environmental Law Enforcement* in INTO THE FUTURE, *supra*, note 22, 46; L.F. Duncan, *Trends in Enforcement* in INTO THE FUTURE, *supra*, note 22, 50.

[64] R. Brown & M. Rankin, *Persuasion, Penalties and Prosecution: Administrative v. Criminal Sanctions* in M.L. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (Toronto: University of Toronto Press, 1990) 325.

[65] W.F. Sinclair, *Controlling Effluent Discharges from Canadian Pulp and Paper Manufacturers* (1991) 17 CANADIAN PUBLIC POLICY 86.

[66] D.N. Dewees, *The Regulation of Sulphur Dioxide in Ontario* in Doern, ed., *supra*, note 53 at 129; and B. Laplante, *Environmental Regulation: Performance and Design Standards* in Doern, ed., *supra*, note 53 at 59.

[67] B.J. Barton, R.T. Franson & A.R. Thompson, *A Contract Model for Pollution Control* (Vancouver: University of British Columbia, Westwater Research Centre, 1984); D.A. Pearson, *Les Aspects Contractuels des risques environnementaux* (1991) L'ENVIRONNEMENT 77-147; T.G. Ison, Book Review of *A Contract Model for Pollution Control* (1985) 63 CAN. BAR REV. 859; G.W.G. Leane, *Environmental Contracts: a lesson in democracy from the Japanese* (1991) 25 U.B.C. L. REV. 361-85. For discussion of contract-based environmental initiatives in Quebec, *see* L. Bourgeat & R. Dussault ADMINISTRATIVE LAW: A TREATISE vol. 1, 2d ed. (Toronto: Carswell, 1985) at 468-69. For description and evaluation of a contract-based approach to environmental assessment, *see* M. Doelle, *Regulating the Environment by Mediation and Contract Negotiation: A Case Study of the Dona Lake Agreement* (1992) 2 J.E.L.P. 189.

arbitration, and negotiation of environmental controversies.[68] The formal resolution of the long-standing White Dog and Grassy Narrows mercury pollution disaster through a negotiated agreement symbolized for many the potential of the ADR process.[69] Statutory ADR schemes have been introduced into a number of jurisdictions.[70] However, serious reservations about the utility and fairness of ADR remain in the minds of some observers.[71]

Finally, economic incentives and market-based solutions became much more prevalent both in contemplation and in implementation. CURRENTS OF CHANGE, the report of the federal water inquiry, made a major contribution to this particular debate simply by broadening awareness of the implications of pricing on the consumption of a highly valuable natural resource in domestic as well as industrial settings.[72] Much more sophisticated applications have been examined or experimented with as efforts were made to provide environmentally-beneficial economic incentives to industry and encouragement for individual Canadians to incorporate environmental considerations into the decisions they make as consumers.[73]

Despite increased analysis of existing legal instruments and the introduction of the plethra of new measures, the "correct" policy responses were elusive or controversial. As PCBs forced the citizens of

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[68] Conflict Management Resources, *Information Resources for Conflict Management* (Toronto: York University, 1989); F.C. Haussman, *Environmental Mediation: A Canadian Perspective* (Prepared for Environment Canada, March 1982); Law Reform Commission of Canada, *Dispute Resolution in Canada: Present State and Future Direction* (Consultation Paper) by A.J. Pirie (Ottawa: Law Reform Commission of Canada, April 1987); The Canadian Environmental Law Association, *Environmental Mediation: Three Case Studies*, vol. 3, by S. Shrybman, (Toronto: Canadian Institute for Environmental Law and Policy, 1984); The Canadian Environmental Law Association, *Environmental Mediation: Five Case Studies*, vol. 2, by S. Shrybman (Toronto: Canadian Institute for Environmental Law and Policy, 1984). The Canadian Environmental Mediation Newsletter contains excellent short analyses.

[69] S.G. Sigurdson, *Lessons from Two Canadian Environmental Disputes*, 1986 Isaac Pitblado Lectures 80; L. West, *Mediated Settlement of Environmental Disputes: Grassy Narrows and White Dog Revisited* (1987) 18 ENVIRONMENTAL LAW 131.

[70] *The Environment Act*, S.M. 1987, c. 26, s. (3); *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

[71] J.B. Waldram, AS LONG AS THE RIVERS RUN: HYDROELECTRIC DEVELOPMENT AND NATIVE COMMUNITIES IN WESTERN CANADA (Winnipeg: University of Manitoba Press, 1988).

[72] P.H. Pearse, F. Bertrand & J.W. MacLaren, CURRENTS OF CHANGE: FINAL REPORT, INQUIRY ON FEDERAL WATER POLICY (Ottawa: Environment Canada, 1985).

[73] M.J. Trebilcock *et al.*, THE CHOICE OF GOVERNING INSTRUMENT: A STUDY PREPARED FOR THE ECONOMIC COUNCIL OF CANADA (Ottawa: Minister of Supply & Services Canada, 1982); Doern, ed., *supra*, note 53; M. Rankin, *Dangerous Moves: The Law Responds to the Transportation of Dangerous Goods* (1990) 24 U.B.C. L. REV. 191; Alberta, *Market-based Approaches to Managing Air Emissions in Alberta* (Discussion paper) by National Economic Research Associates; Canada, *Economic Instruments for Environmental Protection: Discussion Paper* (Supply & Services Canada, 1992).

St Basile from their homes, or as the smoke and fumes from thousands of burning tires drifted around Hagarsville, it was not precisely clear how tort theory, stricter regulations, prison sentences or the market-place might have prevented these situations.

D. *The Players in the Game*

1. *The Profession Wakes Up*

Not long ago environmental law was pioneered in Canada by a handful of dedicated advocates, but as Al Lucas remarked, as recently as the mid-eighties "one could not expect to survive as a pin-striped, brief case-toting private practitioner of environmental law."[74] Today, the membership lists of the "Environmental Practice Group" of many of the country's largest law firms suggest that much has changed; so does a membership list of some 600 names in the Environmental Law section of the Canadian Bar Association, Ontario Branch. Internationalization, expanded grounds for liability and increased penalties, the interest of financial institutions in environmental risks, and the *Charter*, among other factors, now provide niches for real estate, corporate and commercial, securities and other once distant (perhaps even sceptical) practitioners to join litigators and administrative tribunal specialists in the practice of environmental law. Longer hearings and more complex transactions have highlighted the importance of collaboration and economies of scale in the environmental realm of legal practice. Law societies began to develop specialist standards for the field,[75] and firms leaped into the production of advisory bulletins for the benefit of clients and colleagues who were overwhelmed by the volume and complexity of the relevant jurisprudence and environmental legislation. We have also seen the proliferation of specialized journals, special journal issues, and environmental law bulletins, often of high quality,[76] as well as several major works and collections.[77] Conferences and continuing legal education programs abound.

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[74] Lucas, *supra*, note 33 at 168.

[75] Law Society of Upper Canada, Environmental Law Specialty Committee, *Report on Environmental Law Specialist Standards for Certification* (September 1991).

[76] *See, e.g.*, JOURNAL OF ENVIRONMENTAL LAW AND PRACTICE (J.E.L.P.).

[77] D. Estrin, HANDLE WITH CAUTION: LIABILITY IN THE PRODUCTION, TRANSPORTATION AND DISPOSAL OF DANGEROUS SUBSTANCES (Toronto: Carswell, 1986); M. Jeffery, ENVIRONMENTAL APPROVALS IN CANADA: PRACTICE AND PROCEDURE (Toronto: Butterworths, 1989); H. Poch, *supra*, note 60; D. Saxe, ENVIRONMENTAL OFFENCES: CORPORATE RESPONSIBILITY AND EXECUTIVE LIABILITY (Aurora: Canada Law Book, 1990); J. Swaigen, REGULATORY OFFENCES IN CANADA: LIABILITY AND DEFENSES (Toronto: Carswell, Canadian Institute for Environmental Law and Policy, 1992).

2. *Public Interest Groups in Litigation*

As Canadian environmental groups became more numerous and sophisticated, they employed more diversified and refined techniques and strategies to advance their objectives.[78] Extensive lobbying, public education, and direct involvement in policy-making or as advisors through round tables or other consultative mechanisms became typical initiatives alongside protest marches, demonstrations and blockades when these more effectively served the purpose.

There have been notable examples of coordinated efforts marshalling the energy and resources of several environmental groups. The release of the *Green Print* in 1989, the work of the Canadian Coalition on Acid Rain, and the formation of Forests for Tomorrow to participate in a prolonged set of assessment hearings in Ontario are prominent examples. In British Columbia, the West Coast Environmental Law Association spearheaded the campaign of a fifty-four member coalition to promote government action in relation to ongoing and widespread pollution within the pulp and paper industry.

Public interest environmental litigation — though difficult to measure reliably — also appeared more prevalent in the late 1980s, especially if it is broadly defined to include participation in administrative proceedings such as environmental assessments. Procedural developments related to standing and the availability of class actions contributed to these developments.[79] Litigation sponsored by environmental groups was certainly not new in the period, but it has seemed more visible and its potential contributions more clearly analysed and understood. "First You Have to Get Their Attention" is the way Steve Hazell explained the rationale for the Canadian Wildlife Federation challenges to the Environmental Assessment and Review Process (EARP) Guidelines Order, while Elaine Hughes and Elizabeth Swanson list stopping environmentally adverse development, compelling government action, law enforcement, and promoting law or policy reform in an inventory of possible

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[78] *See* A.M. Aldighieri, ed., CANADIAN ENVIRONMENTAL DIRECTORY 1992 (Toronto: Canadian Almanac & Directory Publishing Company Ltd., 1992); Jeremy Wilson estimates that the Canadian environmental movement consists of at least one thousand groups and reports poll results suggesting a possible membership of two million in *Green Lobbies: Pressure Groups and Environmental Policy* in Boardman, ed., *supra*, note 27, 109 at 110-11.

[79] With regard to standing *see Finlay* v. *Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321; and Ontario Law Reform Commission, REPORT ON THE LAW OF STANDING (Toronto: Ministry of the Attorney General, 1989). Regarding class actions, *see Comité d'environnement de La Baie Inc.* c. *Société d'électrolyse et de chimie Alcan Ltée*, [1990] R.J.Q. 655, 29 Q.A.C. 251. On the volume of public interest environmental litigation, *see* S. Elgie, *Environmental Groups and the Courts, 1970-1992*, forthcoming in G. Thompson *et al.*, eds., ENVIRONMENTAL LAW AND BUSINESS IN CANADA (Aurora: Canada Law Book, 1993).

objectives for public interest environmental litigation.[80] Others have summed up the background considerations:

> For many groups, litigation has been a very costly and negative experience. Nevertheless, it is fair to suggest that litigation is a potentially useful tool, if applied with skill, in appropriate cases, provided that the group has sufficient financial and legal resources to fight the inevitably tough opposition. Hence, the presence or absence of public interest litigation in the environmental field in Canada can have an important impact, not only on the specific environmental decisions made but also on the bureaucratic and corporate atmosphere in which such decisions are considered.[81]

The Canadian Environmental Defence Fund (CEDF) was established in the mid-1980s to raise money for public interest participation in court and tribunal proceedings. Subsequently, the CEDF introduced the Legal and Expert Assistance Program (LEAP) to assist environmental groups in making contact with environmental experts, including legal counsel. The cases supported through LEAP have included actions on behalf of the Innu of Labrador and Quebec, the Friends of Oak Hammock Marsh in Manitoba, the Coalition Advocating Responsible Development of the Long Point wetlands site on Lake Erie, and Friends of the Island who wanted to ensure a full public review of the proposed fixed link between Prince Edward Island and the New Brunswick mainland. The West Coast Environmental Dispute Resolution Fund was established in 1989 to help finance citizen participation in litigation and tribunal proceedings, to cover expert fees as needed and to assist involvement in ADR processes. The Fund has been supported by annual grants from the Law Foundation of British Columbia.[82] In 1990, the Sierra Legal Defence Fund established an office in Vancouver to donate legal services for environmental litigation in relation to such issues as wilderness preservation, the protection of endangered species, and water pollution prevention.

3. *Counting Heads*

Statistical evidence indicated changes in the levels of public awareness and concern about environmental issues during the 1980s. One analyst, reporting on the findings of the Environics Research Group surveyed the evolution to 1989:

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[80] S. Hazell, *First You Have to Get Their Attention* unpublished paper presented at a conference on "Current Issues in Canadian Environmental Law" London, 16 May 1990; E.J. Swanson & E.L. Hughes, THE PRICE OF POLLUTION: ENVIRONMENTAL LITIGATION IN CANADA (Edmonton: Environmental Law Centre, 1990).

[81] A.J. Roman & M. Pikkov, *Public Interest Litigation in Canada* in INTO THE FUTURE, *supra* note 22, 165; *see also* B.H. Wildsmith, *Of Herbicides and Humankind: Palmer's Common Law Lessons* (1986) 24 OSGOODE HALL L.J. 161.

[82] 1989-90: $65,000; 1990-91: $200,000; 1991-92: $300,000. *See* West Coast Environmental Law Association, *Annual Reports 1991-1992.*

> Through the early 1980's, the environment was barely a blip on the screen, with the usual economic issues — unemployment, inflation, the economy in general —dominating the worry agenda. [Later,] the environment emerged as the number one issue mentioned by Canadians, ahead of concerns about unemployment, the deficit or free trade.[83]

Others, contemplating a more varied database, noted the difficulty of establishing clear trends regarding the position of the environment in the constellation of public concerns:

> Even as preoccupation with the environment becomes more widespread — as evidenced in the increase of 11% from July 1989 to February 1990 of those "very concerned" with the environment — the overall priority assigned to the environment may decline, as suggested in the drop from 17% to 14% over the same time period in response to the open-ended "most important problem" Gallup question.[84]

4. *The Native Dimension*

In any number of settings across the country, aboriginal communities became more active participants in environmental litigation. The particular environmental issues prompting legal action on the part of native groups have varied widely, and have included compensation claims for past damages, efforts to ensure effective participation in environmental assessment, the defence of native resource use practices and preventive measures to forestall development on lands subject to aboriginal claims.[85] One common and significant feature of the litigation is the integration of environmental considerations with claims relating to the legal status of aboriginal communities as distinctive societies within Canada. While this relationship between environmental and cultural interests has to some degree been recognized for many years, the *Brundtland Report*'s observations on aboriginal societies provided a timely reminder that:

> Tribal and indigenous peoples will need special attention as the forces of economic development disrupt their traditional life-styles — life-styles that can offer modern societies many lessons in the management of resources in complex forest, mountain, and dryland ecosystems.... Their traditional rights should be recognized and they should be given a decisive voice in formulating policies about resource development in their areas.[86]

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[83] K. Neuman, *Public Opinion On the Environment* in INTO THE FUTURE, *supra*, note 22, 3; for a narrative description of events surrounding and affecting changes in the levels of public concern about the environment, *see* Macdonald, *supra*, note 4.

[84] H. Bakvis & N. Nevitte, *The Greening of the Canadian Electorate* in Boardman, ed., *supra*, note 27, 144 at 146.

[85] *See, e.g., R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385; *Wale* v. *British Columbia (A.G.)*, [1991] 1 S.C.R. 62, [1991] 2 W.W.R. 568; *MacMilliam Bloedel* v. *Mullin* (1985), 66 B.C.L.R. 258 (C.A.).

[86] *Brundtland Report*, *supra*, note 48 at 12.

E. *Can All This Be Sustained?*

The concept of sustainable development was in circulation during the early 1980s,[87] but not until the *Brundtland Report* did the language of sustainability achieve ubiquitousness in the environmental context. Although sustainability serves as a slogan as much as a measurable standard, the penetration of the general notion into popular, official, and corporate circles has been quite remarkable.[88] In fact, the *Brundtland Report*'s definition of sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" was incorporated into federal forestry legislation where the minister is required, amongst other duties, to "have regard to the integrated management and sustainable development of Canada's forest resources."[89]

One particularly influential mechanism for diffusion of the general notion of sustainability and one form of its association with economic development was the 1987 *Report of the National Task Force on Environment and Economy*:

> [E]nvironmental and economic planning cannot proceed in separate spheres. Long-term economic growth depends on a healthy environment. It also affects the environment in many ways. Ensuring environmentally sound and sustainable economic development requires the technology and wealth that is generated by continued economic growth. Economic and environmental planning and management must therefore be integrated.[90]

When it emerged from an extended program of discussion and development in 1990, *Canada's Green Plan* outlined a series of legislative and policy measures which were described as "an ambitious national program for achieving sustainable development in this country." Initiatives directed towards the renewable sectors of forestry, agriculture and fisheries were set out alongside specific programs designed to restore and protect air, land, and water domestically while strengthening Canada's response to international concerns including global warming, ozone depletion and acid rain. The *Green Plan* identified decision-making itself as a focus of attention and noted the importance of intergovernmental and other partnerships, regulatory reform, and improved

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[87] *The Way Forward: Conclusions by Environment Ministers at an Informal Meeting in Lancaster House, London, 17 Dec. 1984* (Ottawa 1985).

[88] C.D. Hunt, P.A. Bobeff, & K.A. Palmer, *Legal Issues Arising From the Principle of Sustainable Development: Australia, Canada and New Zealand* (1991) 9 J. OF ENERGY AND NATURAL RESOURCES L. 1 at 11-16.

[89] *The Department of Forestry Act*, S.C. 1989, c. 27. The definition is found in s. 2 and the Minister's duty with regard to sustainable development is set out in s. 6(d). *See also CEPA*, *supra*, note 7, s. 8(2)(d) and *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 [hereinafter *CEAA*].

[90] REPORT OF THE NATIONAL TASK FORCE ON ENVIRONMENT AND ECONOMY (September, 1987) (Chair: Gerard Lecuyer).

information as contributing elements. A five year spending allocation of $3 billion in new federal financing was announced.[91]

Amidst the talk of integrating environment and economy, now so widespread as to be almost universal, there is lingering doubt: for some, environmental protection and remediation can only come as a result of a level of economic growth sufficient to finance the costs; for others economic activity must be subject to inherent environmental and resource constraints which cannot be ignored.[92] A few well-placed observers, Jim MacNeill among them, have argued in response that a transformation has taken place in the "standard agenda" of traditional environmental issues such as pollution and resource depletion. The sustainable development agenda, argues MacNeill, encompasses these established concerns within a broader framework which "integrates them with the issues of growth, development, employment, energy, trade, peace, and security."[93]

The influence of the foregoing matters on Canadian environmental law can be seen in discussion of three selected topics which are surveyed in the following sections of this paper — the management of toxics and contaminated lands, environmental assessment and the environmental roles and responsibilities of individuals.

II. Toxic Substances and Contaminated Lands

A. *Introduction*

1. *The Nature of Toxics*

One vision of the transformation of the Canadian pollution control agenda from the nineteenth century to the present has been captured in the phrase "from sawdust to toxic blobs."[94] At the start of the period under review in this survey, and despite a few notable exceptions, public concern with the environment was perhaps not far removed from sawdust. The emphasis remained on a generalized and traditional understanding of pollution with a focus on the problems of visible emissions and discharges, suspended solids, nutrients and so on.

Legal sub-categories of environmentally harmful substances proliferated rapidly, however, with classification schemes intended to determine the nature and extent of applicable regulatory requirements. Thus, under the general rubric of environmental contaminant, various designations such as deleterious, hazardous, and dangerous substances attracted

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[91] Canada, *Canada's Green Plan* (Supply & Services Canada, 1990) [hereinafter *Green Plan*].

[92] D.H. Meadows, D.L. Meadows & J. Randers, Beyond the Limits: Confronting Global Collapse, Envisioning A Sustainable Future (Toronto: McClelland & Stewart, 1992) at 2.

[93] J. MacNeill, *The Greening of International Relations* (1989-90) 45 Int'l J. 1 at 14-15.

[94] Chappell, *supra*, note 57.

more attention. Waste, too, became a troublesome category as potentially stringent management regimes came into existence. Adjectival escalation and further sub-categorization resulted in separate niches for inherently hazardous or exceptionally dangerous substances within the broader context of just plain old everyday "mere" or "natural" or "background" contamination and pollution. By 1986, David Estrin's review of the legal framework governing dangerous substances at the federal level and in Ontario had to address corrosive, hazardous, ignitable, pathological, radioactive, reactive, severely toxic, and hazardous and liquid industrial waste as well as commercial waste chemicals, leacheate toxic waste, acute hazardous waste chemicals and so-called special situations such as PCB waste.[95]

The concept of toxic substances — though also a troublesome category — offered the prospect of establishing some priorities to focus remedial and regulatory efforts widely regarded as new. Numerous American initiatives and references in the 1978 Great Lakes Water Quality Agreement calling for "zero discharge of persistent toxic chemicals" were part of the development. Joseph Castrilli summarized the characteristics which make toxics so problematic:

> [T]he ability to become widely dispersed in air, land, and water, great distances from their sources and avenues of entry to the environment; the ability to remain highly resistant to natural degradation; the capability of causing biological changes at trace concentrations; the ability to bio-accumulate and pass through food chains; the ability to become more toxic when combined in the environment with other chemicals; and the ability to become irretrievable once released into the environment with effects that are largely irreversible.[96]

Designation of persistent toxics for special attention was an important step in the remarkably slow process of acknowledging that if the environment is contaminated, so, in time, will be the species, including humans, who occupy the planet. Thus, both human health values and environmental sustainability exerted some influence on the framework for response.

Labelling the category of persistent toxics did not lessen the challenge of identifying the characteristics and ultimately determining the contents of that category. Toxic chemicals, although they are understood to pose significant risks to ecosystems or to human health, have resisted precise definition.

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[95] D. Estrin, HANDLE WITH CAUTION: LIABILITY IN THE PRODUCTION, TRANSPORTATION AND DISPOSAL OF DANGEROUS SUBSTANCES (Toronto: Carswell, 1986).

[96] J.F. Castrilli, *Control of Toxic Chemicals in Canada: An Analysis of Law and Policy* (1982) 20 OSGOODE HALL L.J. 322 at 324-25; *see also* J.E. Carroll, ENVIRONMENTAL DIPLOMACY: AN EXAMINATION OF AND A PROSPECTIVE OF CANADIAN-U.S. TRANSBOUNDARY ENVIRONMENTAL RELATIONS (Ann Arbor: University of Michigan Press, 1983) at 153 on the particular challenges of toxics in interjurisdictional settings.

Analysts have found it difficult to determine exactly what human and environmental harm is caused by particular toxic substances. Substances differ in degree of toxicity and in terms of the nature of their impacts, as well as the timing in which those consequences appear. Moreover, the toxicity of certain substances varies in relation to concentration and length of exposure. To complicate understanding still further, toxicity may be influenced by the presence of other substances in the environment, with such combinations and their synergistic consequences remaining largely unknown. Lawyers provided their own understandings of toxics and formulated a rationale for special management regimes. As Paul Muldoon explained:

> Generally, toxicity refers to the capacity of [a] substance to cause some adverse effect on a receptor organism. Usually, toxicity is related to the nature of the substance, its dose, and length of exposure. It is important to examine both the short term high dose effects (acute effects) and long term, low exposure effects (chronic effects).[97]

Procedures and methodologies for measuring toxicity under experimental conditions and for determining so-called "safe" levels of exposure have been closely scrutinized and held up to critical examination.[98] On the other hand, actual adverse health and environmental effects, though by no means always free from controversy, are now more clearly and reliably documented.[99]

A more sophisticated appreciation of the nature and threat of persistant toxics suggested the need for a variety of responses. Not only would measures be required to deal with the management of existing and newly-developed toxic substances, but the legacy of contamination from past use and neglect needed to be addressed.[100]

2. *The Scope of the Toxics Problem in Canada*

While toxic substances are numerous, historic limitations concerning data on their use, distribution and effects on the environment

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[97] P. Muldoon, *Toward a National Pollution Prevention Strategy: Principles For Reform To Address the Problem of Toxic Contamination of the Canadian Environment* in REPORT OF THE CANADIAN BAR ASSOCIATION COMMITTEE ON SUSTAINABLE DEVELOPMENT IN CANADA: OPTIONS FOR LAW REFORM (Ottawa: Canadian Bar Association, 1990) 130 at 130 n. 1.

[98] Law Reform Commission of Canada, POLITICAL ECONOMY OF ENVIRONMENTAL HAZARDS by T.F. Schrecker (Ottawa: Supply & Services Canada, 1984); Law Reform Commission of Canada, *Pesticides in Canada: An Examination of Federal Law and Policy* by J.F. Castrilli & T. Vigod (Ottawa: Law Reform Commission of Canada, 1987); Royal Commission on Matters of Health and Safety Arising From the Use of Asbestos in Ontario, *The Politics of Risk: The Identification of Toxic and Other Hazardous Substances in Canada* (Study No. 4) by G.B. Doern (Ottawa: Centre for Policy and Program Assessment, Carleton University, January 1982).

[99] *See* A VITAL LINK, *supra*, note 5.

[100] Muldoon, *supra*, note 97 at 130.

and health inhibited a comprehensive regulatory response. One writer, citing a provincial minister of the environment to the effect that "[n]o inventory of existing or abandoned landfills has been conducted as the past history of industrialization in this province does not lead us to believe any significant quantities of toxic wastes have been deposited", charitably summarized the official attitude toward toxics in parts of the country as "somewhat complacent."[101] During the 1980s toxic contamination proved to be a significantly more widespread and intractable problem than previously suspected or acknowledged.[102]

Canadian authorities undertook several initiatives to provide basic information concerning the extent of the country's toxic pollution.[103] The findings remain preliminary and are inadequate to establish a comprehensive picture of more than a few specific features of an extensive problem. It was nevertheless clear that contamination was widespread and that the remedial agenda would be challenging and costly. In addition to known waste disposal sites, hundreds of which may present environmental and human health risks, numerous other locations suffer from toxic contamination. These include industrial sites, "particularly mine tailings, coal gasification sites, metal refineries, coking plants, hydro-carbon refineries, bulk plants, scrap yards, chemical companies, electroplating companies, and those using paints and wood preservatives."[104] Commercial, agricultural and even residential properties have not been immune from toxic contamination.[105] Nor can public properties be ignored.[106] And, over and above historic sources of contamination which are at least researchable in principle, there are old spill sites, virtually impossible to locate reliably due to their largely random occurrence and the absence — until quite recently — of systematic reporting procedures and obligations. The underground movement of toxics emerged as an extraordinarily problematic dimension of the overall situation, a

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[101] Nemetz, *supra*, note 10, 551 at 587.

[102] R. Paehlke & D. Torgerson, *Toxic Waste and the Administrative State: NIMBY Syndrome or Participatory Management* in R. Paehlke & D. Torgerson, eds., MANAGING LEVIATHAN: ENVIRONMENTAL POLITICS AND THE ADMINISTRATIVE STATE (Peterborough: Broadview Press, 1990) at 259.

[103] *See* Nemetz, *supra*, note 10, 551 at 588 n. 178 for references to studies from the early 1980s; Commission d'enqête sur les déchets dangereux, LES DÉCHETS DANGEREUX AU QUÉBEC: UNE GESTION ENVIRONNEMENTALE (Quebec: Les Publications du Québec, 1990) (Chair: Y. Charbonneau); Waste Management Committee, *The Contaminated Sites Working Group Report to the Canadian Council of Resources and Environment Ministers* (1988).

[104] Law Reform Commission of Canada, CONTAMINATED LAND by D. Saxe (1990) at 6 [unpublished].

[105] D. Cohen, *The Public and Private Law Dimensions of the UFFI Problem: Part I* (1983-84) 8 CAN. BUS. L.J. 309; D. Cohen, *The Public and Private Law Dimensions of the UFFI Problem: Part II* (1983-84) 8 CAN. BUS. L.J. 410; *Sevidal* v. *Chopra* (1987), 64 O.R. (2d) 169, 41 C.C.L.T. 179 (H.C.); J. Weninger, *Redevelopment of Contaminated Sites — An Update on the Ataratiri Project* in CLEAN-UP OF CONTAMINATED SITES (Mississauga: Insight Press, 1991) (Article xviii).

[106] Ottawa Regional Council Study Report, *Mapping and Assessment of Former Industrial Sites*, City of Ottawa, 1988.

realization which led the federal water inquiry to observe that: "The most urgent need in water quality management policy in Canada is a comprehensive program for controlling toxic substances."[107]

The ongoing use of toxic substances presented serious inventory problems. In addition to identifying known toxics in use and documenting their estimated volumes, effective regulation requires details on geographic distribution, on the circumstances in which toxics are used and on current means of discharge or disposal. The National Pollutant Release Inventory and Ontario's Municipal Industry Strategy for Abatement were among the initiatives taken to improve the information base.

B. *Some Examples*

The number of toxic substances in existence and the diversity of the problems they pose renders a survey by the non-specialist hazardous in the extreme. Reference to a selected list of much-discussed toxics serves, nevertheless, as a reminder of developments during the decade, and provides a partial setting for consideration of legal initiatives.

The displacement of some 3,500 people as a consequence of the PCB storage problems at St. Basile Le Grand demonstrated the vulnerability of urban populations to toxic concentrations[108] even as the 1985 PCB spill on the Trans Canada highway near Kenora and revelations concerning the contamination of numerous Arctic sites demonstrated that remoteness was no guarantee of immunity. Although PCBs were already the subject of regulatory controls dating from the 1970s,[109] attention focused on PCBs again in the late 1980s amidst considerable controversy over storage, exports, appropriate disposal technology and costs, and the tainted fuel scam.[110]

For the Quebec Commission d'enquête sur les déchets dangereux chaired by Yvon Charbonneau, the PCB situation symbolized the general challenge of toxics in many ways:

> Au cours de ses tournées régionales, la Commission a été à même de constater que les BPC constituent un symbole alimentant la résistance sociale aux mesures de gestion des déchets dangereux. Les communautés qui ont vécu récemment des conflits reliés à la gestion des BPC en gardent des blessures profondes : détérioration des relations de bon voisinage, destruction des solidarités, etc. Des groupes très polarisés présentant des positions en apparence irréconciliables en ont témoigné devant la Commission....

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[107] CURRENTS OF CHANGE, *supra*, note 72 at 109.

[108] A. Prevost, *St-Basile-Le-Grand: de l'enfance à l'adoloescence du droit de l'environnement* in DÉVELOPPEMENTS RÉCENT EN DROIT COMMERCIAL (Cowansville, Que.: Yvon Blais, 1989) at 355-78.

[109] Castrilli, *supra*, note 96, 322 at 349-59.

[110] PCBs were among the substances added to fuels for dispersal in the "tainted fuel scam", *see* "Fuel Laced With Toxic Wastes Sold in Lucrative Scam" *The [Toronto] Globe and Mail* (8 May 1989) A1.

> Alors qu'ils ne représentent qu'une infime proportion du total des déchets dangereux, les déchets contaminés aux BPC en sont arrivés à symboliser le mal environnemental. Toute stratégie d'intervention doit prendre ce fait en considération sérieuse.[111]

Another symbolic episode in a decade of seemingly unexpected encounters with chemical hazards involved the infamous "toxic blob" in the St. Clair River, a part of the Great Lakes system on the border with the United States. The origins of the blob were attributed at the time to the accidental spill of dry-cleaning fluid which combined on the river bottom with a number of more hazardous chemicals already present in sediment. Yet the precipitating incident was by no means an isolated occurrence; governmental research and journalistic investigation confirmed that between 1972 and 1984, 275 toxic spills had taken place in the vicinity and that approximately half of these entered the river itself.[112]

Dioxins, the name referring to a family of chemical compounds including "the most toxic synthetic chemical ever tested in the laboratory" also secured a prominent place in the regulatory agenda in both the United States and Canada. Highly publicized incidents involving pulp mill effluents produced public alarm and attracted federal and provincial reaction.[113]

While the PCB and toxic blob experiences might suggest that the exclusive focus of concern regarding toxics has been on accidental or incidental releases which have been comparatively isolated, other evidence pointed towards endemic practices creating systemic risks from toxics. Studies relating to pesticides demonstrated important concerns about the authorization and use of chemical substances and helped to stimulate inquiry into the approvals process.[114]

C. *Toxic Challenges to Legal Arrangements*

1. *The Common Law*

Toxics litigation remained a source of continuing fascination for those interested in the inherent limitations of common law proceedings.

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[111] Commission d'enquête sur les déchets dangereux, *supra*, note 103 at 293-94.

[112] Chappell, *supra*, note 57 at 13; the Honourable R. Grier, Ontario Minister of the Environment, indicated that a further 550 chemical spills into the St. Clair River were recorded in the Sarnia area during the six year period ending in 1991, a year in which sixty-five such spills occurred. *See* "Polluters Will Be Hit Hard, Grier Warns" *The [Toronto] Globe and Mail* (22 May 1992) A4.

[113] K. Harrison & G. Hoberg, *Setting the Environmental Agenda in Canada and the United States: The Cases of Dioxin and Radon* (1991) 24 CAN. J. OF POL. SCI. 3.

[114] G. Hoberg, *Risk, Science and Politics: Alachlor Regulation in Canada and the United States* (1990) 23 CAN. J. OF POL. SCI. 257; Federal Pesticide Registration Review Team, RECOMMENDATIONS FOR A REVISED FEDERAL MANAGEMENT REGULATORY SYSTEM (Ottawa: Minster of Supply & Services Canada, 1990).

One prominent example from Atlantic Canada[115] is often cited as an important illustration of the obstacles facing plaintiffs. "This case", write Joseph Castrilli and Toby Vigod," clearly demonstrates the inadequacies of the common law in dealing with cases involving long-term health impacts from past or future exposure to toxic chemicals where there is a long latency period from the time of the release, subsequent exposure and the onset of damages to health."[116] The obstacles in terms of injury causation and damages, for example, have not entirely deterred plaintiffs from bringing forward toxic tort claims, however, as recent litigation from the Pacific coast demonstrates.[117]

2. *Toxic Substances and the New Dimensions of Environmental Law*

Efforts to address the problems of toxic contamination in the U.S. have involved numerous statutes,[118] notable among them the *Comprehensive Environmental Response, Compensation and Liability Act* of 1980, enacted in the era of public revelations about conditions in Love Canal.[119] *CERCLA* required the U.S. Environmental Protection Agency to undertake the tasks of identifying the principal contaminated sites in the country, evaluating the extent of the hazard each posed and pursuing clean-up measures. These initiatives were to be funded by the contributions of a widely drawn group of "potentially responsible parties" (PRP). To finance clean-ups in circumstances where no PRPs were identifiable or could not provide funding, *CERCLA* provided for the creation of a Superfund based on taxes levied against petroleum and chemical producers.[120]

The number of potentially hazardous sites as well as sites designated for remedial action on the U.S. National Priority List and the estimated costs of clean-up increased dramatically as investigations continued. The 1986 *Superfund Amendment and Reauthorization Act of 1986* (*SARA*) provided additional clean-up financing and addressed several

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[115] *Palmer* v. *Nova Scotia* (1983), 60 N.S.R. (2d) 271, 2 D.L.R. (4th) 397 (S.C.).

[116] J.F. Castrilli & T. Vigod, PESTICIDES IN CANADA: AN EXAMINATION OF FEDERAL LAW AND POLICY (Ottawa: Law Reform Commission of Canada, 1987) at 24. *See also* R.L. Rabin, *Tort System on Trial: the Burden of Mass Toxics Litigation* (1989) 98 YALE L.J. 813; and R.L. Rabin *Environmental Liability and the Tort System*, (1987) 24 HOUS. L. REV. 27.

[117] *Gagnier* v. *Canadian Forest Products Ltd* (1990), 23 A.C.W.S. (3d) 1040, 51 B.C.L.R. (2d) 218 (S.C.); *Hunt* v. *Carey*, [1990] 2 S.C.R. 259; N.J. Tuytel, *The Prospects for Asbestos and Other Toxic Tort Litigation in Canada: A British Columbia Perspective* (1990) 8 CAN. J. INS. L. 4. For discussion of the civil code and toxics, *see* J.M. Spears, *Government Regulation and the Environment: the Role of the Civil Code* in Faculty of Law, McGill University, MEREDITH MEMORIAL LECTURES 1989 (Cowansville, Que.: Yvon Blais, 1990) 199.

[118] Nemetz, *supra*, note 10 at 586-87.

[119] 42 U.S.C. §§ 9601-9657 (1980), [hereinafter *CERCLA*].

[120] *Ibid.*

uncertainties in the original legislation. *SARA* broadened the tax pool which supports the Superfund and brought U.S. federal lands into the clean-up program.[121]

The American experience highlighted the multi-faceted nature of the toxics problem, for toxics figure in production and consumption by industry and are found as well in the commercial and domestic context. In addition, persistent questions of disposal and management arise in connection with the entry of toxics into the waste stream. Over and above the preventative issues the U.S. framework acknowledged the residual aspects of the toxics problem deriving from an earlier era of neglect: location and identification of contaminated sites, determination of remedial standards and methods of clean-up, identification of perpetrators or PRPs, funding and monitoring clean-ups, and the challenge of dealing with abandoned or "orphan" sites.

One notable consequence of these developments, (and comparable Canadian measures to be discussed below,) has been a significant redefinition of the boundaries of environmental law. Liability for toxic substances and contaminated lands as well as waste management obligations has contributed significantly to the insinuation of environmental considerations into other fields of law, in particular real estate transactions, corporate and commercial agreements, and financing. Associated with these developments in environmental liability for toxic substances are specifically designed insurance arrangements involving their own costs and exclusions. These arrangements emerged in the context of the liability insurance industry, overall, experiencing major challenges and re-organizing in the 1980s. These issues cannot be extensively discussed here, but some commentary will help to show the way in which the scope and definition of environmental law were altered during the 1980s.

Real Estate

Real estate practice prior to the 1980s was not unaffected by considerations of environmental liability, but their significance in both residential and commercial transactions grew markedly thereafter. Increased awareness came about in response to several factors including liability for non-disclosure of contamination or the risk of contamination and the prospect of both agents' and practitioners' liability.[122] The concerns of bankers and other providers of real estate financing also grew, particularly as a consequence of statutory extensions of environmental liability.[123]

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[121] CONTAMINATED LANDS, *supra*, note 104 at 230-95; *Superfund Amendment and Reauthorization Act of 1986*, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. § 9601 (1992)).

[122] *Sevidal* v. *Chopra* (1987), 65 O.R. (2d) 169, 2 C.E.L.R. (N.S.) 173 (H.C.J.).

[123] Formal disclosure requirements involving the risk of voidability have also begun to draw the attention of the real estate community to environmental factors. *Ontario Evironmental Protection Act*, R.S.O. 1990, c. E-19, s. 197, [hereinafter *OEPA*].

Practitioners have become more alert to potential environmental problems whether the indications are provided by historic use, topography, the character of the neighbourhood or district, or based on specific information. Thus armed, legal advisers in real estate transactions may initiate on-site examinations or otherwise more actively pursue investigations and negotiations to protect their clients' interests in relation to environmental risk.[124] Several newly-created public data bases now provide additional means of investigating environmental risks.

Lenders' Liability

Mortgagees in particular, lenders generally, and those such as trustees and receivers acting on their behalf found their interests intertwined to a surprising degree with environmental legislation governing contaminated lands and other dangerous situations.[125] In *Northern Wood Preservers*, the Ontario Divisional court considered — among other issues — the liability of the mortgagee of a lease under a control order calling for study of contaminated industrial lands and an assessment of remedial alternatives.[126] Among the issues raised was the possibility that a mortgagee might exercise "control" so as to become a "person responsible" under the applicable legislation. In the circumstances of the case, and notwithstanding its knowledge of contamination amounting to breach of the covenant of good repair, the mortgagee who was not in possession was not liable. The Ontario Divisional Court explained that the mortgagee might have exercised a power of re-entry and taken control of the property:

> Once in control of the property it could be a person responsible under the Act if, at that time, it was found that the plant was the source of contaminant....The fact that the technical, legal ownership of the plant is in the mortgagee does not make it an owner within the definition of a person responsible. To be an owner within the meaning of the Act, and subject to the serious responsibility imposed by it, there must be

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[124] D. Cox, *Toxic Real Estate Transactions* in INTO THE FUTURE, *supra*, note 22 at 103; B.J. Stammer, *Environmental Uncertainty in Real Estate Transactions: Controlling the Risk of Liability* 51 R. DU B. 471. *See also, ibid.*, s. 19.

[125] R.G. Tremblay & H. Aston, *The Deductibility of Environmental Clean-up Costs* (1991) 3 CAN. CUR. TAX C77; R.E. Keeler, *Enforcing Security against Business Assets: Impact of Environmental Statutes on Recovery* (1991) 8 NAT'L INSOLV. REV. 42; R.E. Keeler, *Environmental Liability in an Insolvency* (1991) 8 NAT'L INSOLV. REV. 68; A. Hudec & J. Paulus, *Environmental Disclosure Obligations of Canadian Reporting Issuers* (1991) 6 SECURITIES REV. 7; J.D. Baker, *Lenders' Environmental Liability* (1991) 6 B.F.L.R. 189; D. Saxe, *Trustees and Receivers: The Environmental Hot Seat* (1990) 76 C.B.R. 34; W.A. Tilleman, *Lender Liability in Alberta* in INTO THE FUTURE, *supra*, note 22 at 122; W.A. Tilleman, *Due Diligence Defence in Canada for Hazardous Clean-up and Related Problems: Comparison with the American Superfund Law* 1 J.E.L.P. 179.

[126] *Canadian National Railway Co.* v. *Ontario (Director appointed under the Environmental Protection Act)* (1991), 3 O.R. (3d) 609, 6 C.E.L.R. (N.S.) 211 (Div. Ct.) [hereinafter cited to C.E.L.R. (N.S.), *aff'd* (1992) 7 O.R. (3d) 97, 87 D.L.R. (4th) 603 (C.A.) [hereinafter *Northern Wood Preservers*].

> possession or dominion over the facility or property....We do not believe it makes any difference whether a mortgagee ... had knowledge of the contamination or not. If a mortgagee has taken no active steps with respect to gaining or obtaining control of the property, it is not responsible.[127]

The Divisional Court decision, welcomed for its contribution to a fuller understanding of "care, management and control" was notable for the sensitivity of the surrounding policy implications. While some observers characterized the Divisional Court's overall analysis as an obstacle to attempts by the Ministry of Environment to impose clean-up costs on private parties rather than the public at large, others welcomed the result, arguing that "It is too often assumed that current landowners should be made responsible for the condition of their land. However, where those conditions were created by others at a time when our current environmental sensitivity did not exist, is it unreasonable to suggest that society at large should pay for the cost of returning the environment to its natural state?"[128] On the other hand, critics lamented what they perceived as a lost opportunity for impressing upon lenders an awareness of the potential environmental implications of their financing decisions. In Mario Faieta's words, "Implicitly, the Court is rewarding lenders who do nothing about environmental problems, and penalizing those lenders who do get involved. This is so even where the lender knows about the contamination or....actively contributed to it through its prior operation of the plant."[129]

Despite such environmentally-oriented expressions of disappointment, a widely discussed Alberta decision suggested that lenders and creditors generally should not assume that judicial policy will be uniformly consistent with their interests. In *Panamericana de Bienes y Servios S.A.* v. *Northern Badger Oil and Gas Ltd*, the Alberta Court of Appeal held that procedures for well abandonment ordered by the Alberta Energy Resources Conservation Board (AERCB) represented a general obligation for environmental work in the public interest which the receiver/manager must pay out of the proceeds of disposition of a bankrupt company's assets prior to a distribution to secured creditors according to the scheme of the federal *Bankruptcy Act*.[130] In an assessment critical of the court for its treatment of the bankruptcy issues, one western commentator concluded that "lenders must increasingly look to self-protection through careful investigation and the establishment and

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[127] *Ibid.* at 227.

[128] H. Dahme, *Northern Wood Preservers: a case of contaminated land* (1991) 2 ENV. L. ALERT 1 at 2. *See also*, S.G. Requadt, *Lender on a Hot Tin Roof: The Developing Doctrine of Lender Liability for Environmental Cleanup in Canada* (1992) 50 U.T. FAC. L. REV. 194 at 201-04.

[129] M.D. Faieta, *Case Comment on* Canadian National Railway Co. *v.* Ontario (Director appointed under the EPA) 6 C.E.L.R. (N.S.) 237 at 242.

[130] (1991), 81 D.L.R. (4th) 280, 8 C.B.R. (3d) 31; additional reasons at (1991), 8 C.B.R. (3d) 31 at 55, 86 D.L.R. (4th) 567 (Alta. C.A.). (Leave to appeal to S.C.C. refused); *Bankruptcy Act*, R.S.C. 1985, c. B-3.

maintenance of on-going monitoring programs before a lending decision is made." The same advice applies to receivers and trustees.[131]

In June 1990, as *Northern Wood Preservers* was proceeding through the courts, the Ontario legislature expanded liability for clean-up costs to previous owners and other parties who may not themselves have caused pollution.[132] Concern about the developing pattern of liability prompted the Canadian Bankers Association to lament "that environmental protection law in Canada punishes the innocent as well as the guilty; that lenders and investors who are not polluters are being asked to pay the penalty for environmental damage caused by others." Although the association warned policy-makers about the economic effects of environmental initiatives directed at "deep pockets" rather than actual polluters, the virtue of expanded liability lies in its potential to recruit financial institutions to the cause of systematic environmental monitoring.[133]

Insurance

The liability insurance market in general experienced severe pressures in the first half of the 1980s, and typically responded with the replacement of occurrence-based policies by "claims made" policies; both premiums and deductibles were increased simultaneously. The broadening exposure of business to economic risk resulting from expanded liability for environmental damage accentuated the importance of adequate insurance coverage and at the same time re-enforced the insurance industry's awareness of its own particular vulnerability to uncertainty in the environmental field. The response, as the Slater Task Force on Insurance reported in 1986, actually included the elimination of coverage for environmental risk: "the availability of insurance coverage for 'sudden and accidental' pollution has shrunk considerably, while coverage for environmental impairment and longer-term pollution risks has virtually dried up. Indeed, the claims-made commercial general liability policies of both the Insurance Bureau of Canada and Lloyd's of London specifically exclude pollution coverage."[134] Risks associated with toxics were especially problematic from the vital perspective of predicting accident cost:

> For many reasons the amount of damage that current and past uses of toxic substances ultimately will cause cannot be predicted. Scientific

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[131] P. Lalonde, *Lenders and their Agents Beware: the Northern Badger Case* (1991) 2 ENV. L. ALERT, No. 6, 1 at 3. *See also*, S. Cantlie, *When Words Collide: Environmental Regulation in Conflict with Bankruptcy Legislation* 21 CAN. BUS. L.J. 190.

[132] *OEPA*, *supra*, note 123, s. 7.

[133] Canadian Bankers Association, *Sustainable Capital: The Effect of Environmental Liability in Canada on Borrowers, Lenders, and Investors* (November 1991).

[134] Ontario, *Ministry of Financial Institutions, Final Report of the Ontario Task Force on Insurance* (May 1986) (Chair, David Slater) at 38.

> uncertainty is one reason; knowledge of the hazardous properties of toxic chemicals is in its infancy. The synergistic effect of chemicals that have been mixed together during storage in waste dumps are even less clear. The ways in which hazardous waste migrates from storage facilities into contiguous property and water supplies are not completely predictable. And toxic tort disasters tend to be catastrophic in scope and sporadic in occurrence. All this makes it very difficult to predict the ultimate riskiness of activities involving toxic substances.[135]

After extensive consultation about the problems posed by the absence of pollution liability insurance, a pool of insurers designated as the Pollution Liability Association agreed to underwrite a limited pollution liability policy which was obtainable as a rider to comprehensive general liability policies. The coverage thus re-established contains important exclusions and limitations which raise complex legal questions for those seeking to avail themselves of its protection.[136]

Audits

Developments in environmental liability relating to real estate transactions and financing, as well as the implications of revised insurance arrangements and the importance of due diligence in the aftermath of *Sault Ste. Marie*[137] all contributed to more frequent resort to environmental audits.[138] One recent definition sets out the essential criteria and basic objectives:

> [E]nvironmental audit is a systematic, documented, objective evaluation of a facility's management, operations and equipment that may have either a direct or indirect effect on the environment with a view to assessing (1) compliance with corporate policies, which should include meeting regulatory requirements; (2) risks of exposure to liability for environmental damage; and (3) opportunities for reducing, reusing or recycling wastes.[139]

The costs and complexities of involving professional consultants, the desire to maintain confidentiality of potentially critical reports, pressures towards standardization and the design of general principles of environmental auditing generated a high level of interest and debate.[140] Struc-

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[135] K.S. Abraham, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY AND PUBLIC POLICY, (New Haven, Conn.: Yale University Press, 1986) at 47.

[136] *See* Poch, *supra*, note 60 at 83-132 (for an extensive discussion); *see also*, Stammer, *supra*, note 124 at 484-86 for the background to the situation in Quebec; K.N. Feldman, *Interpreting the Pollution Exclusion Clause* (1990) 2 ENV. L. ALERT, No. 2, 1; B.H. Bresner, *The Spills Bill, Insurance of Pollution Risks* in S.M. Makuch, ed., THE SPILLS BILL: DUTIES, RIGHTS AND COMPENSATION (Toronto: Butterworths, 1986) at 35-42; *Pilot Insurance Co.* v. *Tyre King Recycling Ltd* (1992), 8 O.R. 236.

[137] *R.* v. *Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 7 C.E.L.R. 53.

[138] *See generally*, REGULATORY OFFENCES IN CANADA, *supra*, note 77.

[139] D.R. Cameron, ENVIRONMENTAL CONCERNS IN BUSINESS TRANSACTIONS: AVOIDING THE RISKS (Toronto: Butterworths, 1993) 80.

[140] P. Edwards, *Confidentiality in Environmental Auditing* (1990) 1 J.E.L.P. and the COMMENTARY in reply by R. Cotton & R. Mansell, (1992) 2 J.E.L.P. 117.

tured as a protection measure from the viewpoint of the parties at whose behest it is commissioned, audits also serve the more general goal of toxic pollution prevention.

D. *Statutory Initiatives Regarding Prevention, Remediation and Compensation*

1. *Canadian Environmental Protection Act (CEPA)*[141]

The *CEPA* of 1988 established the federal government's framework for a more comprehensive regime to regulate the use of toxic substances. A number of essential features of the initiative derive constitutional support from the *Crown Zellerbach* elaboration of the federal POGG power in relation to environmental protection although the strength of that support has been queried.[142]

The Prior Regime: The Environmental Contaminants Act

The Canadian *Environmental Contaminants Act*[143] (*ECA*) was intended to deal with environmentally harmful substances which had not been effectively regulated through legislation directed at conventional pollution problems. It provided early opportunities to respond to concern about such toxics as PCBs, Mirex, and chlorofluorocarbons (CFCs), generally on the basis of tripartite consultations involving the federal and provincial governments and trade associations.[144] The *ECA* was subject to criticism on the basis of several limitations. Certain limitations such as inadequate provision for information gathering, the omission of notice or labelling requirements, and obstacles to effective inspection might, in principle, have been corrected by means of modest adjustments to the original statute; other concerns were more fundamental.[145] Firstly, the absence of a process for defining toxic priorities left the original scheme without administrative focus. There was much to be done, but little means of ensuring visibility and garnering support.[146] Secondly, in the absence of mechanisms for public involvement, the *ECA* operated with less accountability and less basis for community initiative than later observers considered necessary. In addition, the *ECA*'s provisions did not meet the challenge of disposal which later came to be recognized as a vital and possibly determinative element in environmental protection strategies.[147]

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[141] *Supra*, note 7.

[142] *Case Comment on* R. *v.* Crown Zellerbach, *supra*, note 30 at 363; Northey, *supra*, note 33 at 144.

[143] S.C. 1974-75, c. 72 [hereinafter *ECA*].

[144] T.L. Ilgen, *Between Europe and America, Ottawa and the Provinces: Regulating Toxic Substances in Canada* (1985) CAN. PUB. POL. 578 at 586.

[145] Nemetz, *supra*, note 10 at 592-93.

[146] Conway, *supra*, note 53 at 34-38.

[147] Northey, *supra*, note 33 at 132-33.

Enforcement actions under the *ECA* were few in number[148] but this is in large part a consequence of the awkward constitutional position of the federal government which, in Al Lucas' words, led to the *ECA* being "carefully and narrowly implemented."[149]

Although Environment Canada set up a toxics management centre in 1980, an overview of the federal government's operations in relation to toxics concluded, early in 1982, that "no overall strategy or policy respecting toxic chemicals is in place to give guidance in priority setting and major resource allocation."[150] This report identified interdepartmental problems within the federal government and limitations in the availability of information from manufacturers and importers among the challenges to be addressed. While internal government criticism and review continued, external commentaries increased pressure for legislative and administrative response to an issue that was gaining prominence and raising public alarm.[151] Although it regarded the federal government's involvement in the toxics field as essentially residual to the provincial role, one of the Neilsen Task Force study team reports also noted "a lack of coherence among programs and....a lack of overall priorities." Fifty-four acts administered by two dozen departments were found relevant to toxics in some way, but the *ECA* "has insufficient powers to deal with this area of increasing public concern."[152] Not long afterwards, the *Brundtland Report* noted toxics specifically as a subject to be addressed in terms of "manufacture, marketing, use, transport, and....disposal." The report added that the regulation "should normally be done at the national level, with local governments being empowered to exceed, but not to lower, national norms."[153]

CEPA's Response to Toxic Substances

Rather than amending the *ECA*, the federal government was determined to use new legislation in response to toxics and for the purposes of consolidating other environmental measures.[154] *CEPA* defined toxic substances with particular regard to characteristics likely to enhance the constitutional legitimacy of federal action. Thus, for purposes of the new legislation:

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[148] Conway, *supra*, note 53 at 36.

[149] Lucas, *supra*, note 30 at 355.

[150] Canada, *Toxic Chemical Related Activities Within the Federal Government (FY 81/82): An Overview* (February, 1982) J.A.S. Walker & R.D. Hamilton, 77.

[151] CURRENTS OF CHANGE, *supra* note 72 at 67.

[152] *A Study Team Report to the (Erik Nielsen) Task Force on Program Review — Regulatory Programs* (May 1985) 211. *See also*, Environment Canada, *From Cradle to Grave: A Management Approach to Chemicals*, Ottawa, September 1986; Environment Canada, *Proposal to Amend the Environmental Contaminants Act*, Ottawa, February 1985; Environment Canada and Health and Welfare Canada, *Final Report of the Environmental Contaminants Act Amendments Consultative Committee*, Ottawa, October 1986.

[153] *See Brundtland Report*, *supra*, note 48 at 219-20.

[154] For a critical review of the consultation process preceding the enactment of *CEPA*, *see Conflict and Cooperation on the Environment*, *supra*, note 32.

> a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions (a) having or that may have an immediate or long-term harmful effect on the environment; (b) constituting or that may constitute a danger to the environment on which human life depends; or (c) constituting or that may constitute a danger in Canada to human life or health.[155]

CEPA thus provided an opportunity to narrow the federal regulatory focus to specifically-designated "Toxic Substances".[156]

The prescribed requirements may entail "cradle-to-grave" or "life-cycle" monitoring and controls in that *CEPA* authorizes regulations dealing with importing, exporting, manufacturing, processing, use, storage, transportation and disposal among other matters.[157] The contrast between *CEPA*'s potentially comprehensive control regimes on designated substances and more traditional emissions regulation has been noted. As Rod Northey explains, environmental regulation generally focuses on individual processes causing a certain type of pollution. Thus, by way of example, air pollution regulation has been directed at individual emission sources within a designated geographical jurisdiction. In addition, "most environmental regulation focuses on production processes, providing point-source regulation of pollution....like smoke stacks, exhaust pipes, and sewers. By contrast, cradle-to-grave regulation tracks and limits the flow of toxic chemicals everywhere the chemical exists."[158]

The designation process is, of course, crucial to the overall effectiveness of the *CEPA* model, and while the procedures for classifying substances have significant attractions, important limitations were apparent from the outset. The welcome features of the classification process were provision for the gathering, analysis and dissemination of information, and the opportunities for public participation and external reviews of ministerial decisions as to which substances should or should not be added to the toxic substances list. An initial priority substances list included forty four substances, and assessments commencing with dioxins and furans were begun. Limitations are found in relation to procedures for evaluating and making determinations about whether to regulate an extensive number of pre-*CEPA* substances.[159] In addition, provisions to

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[155] *Supra*, note 7, s. 11. The constitutionality of *CEPA*'s approach to toxics has been challenged. *See R.* v. *Hydro-Québec*, [1991] R.J.Q. 2736 (C.Q.).

[156] More narrowly defined categories of prohibited substances, toxic substances requiring export notification, and hazardous wastes requiring export or import notification are governed by further restrictions and controls. *Ibid.*, ss. 41-45.

[157] *CEPA*, *ibid.*, s. 34.

[158] Northey, *supra*, note 33 at 134.

[159] R.D. Lindgren, *Toxic Substances in Canada* in INTO THE FUTURE, *supra*, note 22 at 40; Vanderzwaag & Duncan, *Canada and Environmental Protection*, *supra*, note 33 at 9 state: "The most obvious limitation in the legislation is the broad ministerial discretion to name substances to the Priority List and to recommend regulatory action." Following assessment of dioxins and furans as "priority substances" and their addition to the "toxic substances list" regulations governing effluent discharges of these substances by pulp and paper mills were passed in 1992. S.O.R./92-267, 268, 269, 7 May 1992.

coordinate the relationship between *CEPA* and provincial control regimes including reference to the concept of "equivalency" have been controversial.[160] The disappointments therefore revolve around discretion, delay and possible inconsistencies arising from the continuing absence of Canada-wide standards for the regulation of substances which pose threats to human health and the environment.

2. *Transportation of Dangerous Goods*

In 1979, the Mississauga derailment and evacuation revealed significant deficiencies in provisions governing the transportation of dangerous substances, some but not all of which might also be regarded as persistent toxics.[161] The legal controls in place at the time of the disaster were considered to be too particularized and sectoral either to provide an effective response capability or to reduce the likelihood of such occurrences in the first place.[162] The volume and diversity of hazardous substances being shipped throughout Canada clearly indicated the need for a more systematic and comprehensive framework for prevention and response.[163] In order "to promote public safety in the transportation of dangerous goods" the federal government legislated in the immediate aftermath of the Mississauga disaster to establish such a framework, although the legislation anticipated provincial collaboration as well as detailed regulations.[164]

The length and complexity of the regulatory scheme perplexed more than a few analysts, but the essential operating principles of the original controls on the transportation of dangerous goods were readily understood. The Act was intended to apply to "all handling, offering for transport and transporting of dangerous goods, by any means of transport, whether or not for hire or reward and whether or not the goods

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[160] Lindgren, *ibid.*, has remarked that "these vague sections effectively and deliberately undermine the federal government's ability to implement a comprehensive nationwide toxics program." On the other hand, Lucas in *Case Comment on* R. *v.* Crown Zellerbach, *supra*, note 30 at 367, observes of the equivalency provisions: "These may effectively limit the reach of CEPA regulation to an ambit that is consistent with both LeDain and LaForest JJ.'s views of POGG singleness or indivisibility of subject matter. The equivalency provisions also demonstrate that the legislation is carefully designed in terms of its scale to intrude on provincial environmental jurisdiction as little as possible." *See also* A.R. Lucas, *Jurisdictional Disputes: Is "Equivalency" A Workable Solution?* in INTO THE FUTURE, *supra*, note 22 at 25; and M. Walters, *supra*, note 33.

[161] Mr. Justice S. Grange, Chair, *Report of the Mississauga Railway Accident Inquiry* (1981).

[162] Rankin, *supra*, note 73 at 213.

[163] Current estimates concerning the distribution of dangerous goods suggest that approximately 200 million tonnes of dangerous goods were transported in Canada in the 1990-91 year. Road, marine, rail and air transport modes accounted for 59%, 28%, 11% and 2% of the total volume respectively — Transport Canada, *Transport Dangerous Goods Annual Report 1990-91* (Ottawa, 1991) at 11.

[164] By 1985, with the development of regulations completed, the new system was implemented. S.O.R./77-85, 1 July 1985.

originate from or are destined for any place or places in Canada."[165] Dangerous goods (the object of the preventive arrangements) included any product, substance, or organism contained either "by its nature" or by regulation in a scheduled classification list.[166] "Handling" was also broadly defined to mean "loading, packing or placing, unloading, unpacking or removing or reloading, repacking or replacing dangerous goods in or from any container, packaging or means of transport or at any facility for the purposes of, in the course of or following transportation and included storing dangerous goods in the course of transportation." The original federal requirements included duties concerning registration and classification, labelling, packaging and documentation as well as staff training. In anticipation that dangerous substances, despite precautions, might escape or be discharged, the *TDGA* also imposed reporting requirements and an obligation to "take all reasonable emergency measures consistent with public safety to repair or remedy any dangerous condition or reduce or mitigate any danger to life, health, property or the environment that results or may reasonably be expected to result from the discharge, emission or escape."[167]

The need to include intra-provincial transportation within the scope of the *TDGA*'s coverage was addressed by means of provisions to encourage negotiated agreements with the provinces concerning the implementation and administration of the Act.[168] Failing agreement, however, the federal Minister of Transport was authorized to proceed.... "as if an appropriate agreement had been entered into."[169] The provinces were responsive to the virtues of consistency in relation to the transportation of dangerous goods and legislated accordingly.[170]

The *TDGA* appears to have provided an effective framework for inter-jurisdictional co-operation in a field where co-ordination between jurisdictions and between agencies is a central element of an effective regulatory regime.[171] But despite a reasonable level of satisfaction, early experience with the statute and international developments suggested the desirability of refinements.[172] Thus, on the basis of a 1990 discussion paper and consultations, federal legislation introduced several innova-

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[165] *Transportation of Dangerous Goods Act*, R.S.C. 1985, c. T-19, s. 3(1) [hereinafter *TGDA*].

[166] Nine general classifications have been established: explosives, compressed gases, flammable liquids, flammable solids, oxidizers and organic peroxides, poisonous and infectious substances, radioactives, corrosives, and miscellaneous.

[167] *TDGA*, *supra*, note 165, s. 17(2).

[168] *Ibid.*, s. 25.

[169] *Ibid.*, s. 33(4).

[170] Provisions for co-ordination with *CEPA* are contained in *CEPA*, *supra*, note 7, ss. 34(3) & 43.

[171] *See* Rankin, *supra*, note 73 at 198: "[P]ublic and environmental safety in this field demands that there be a planned, co-ordinated and effective response to such emergencies which, in turn, cannot occur without the agreement of all levels of government and of private industry."

[172] *See, e.g.*, *R.* v. *Canadian Pacific Express Transport Ltd* (1990), 31 O.A.C. 54.

tions. In particular, the new *Transportation of Dangerous Goods Act, 1992*[173] provides for greater controls on design and construction standards for containers and requires the preparation and prior approval by the Minister of Transport of emergency response plans. The powers of inspectors, notably in relation to preventive orders, have been increased. The foundations have also been laid for electronic computerized monitoring to allow firefighters and other front-line response team members to identify the precise nature of goods in transit more promptly than has previously been possible.[174] The scope of penalties and remedial orders has been broadened to incorporate (a) power to prohibit a convicted offender from engaging in activities regulated by the act, (b) a duty to compensate those who undertook remedial work on the environment as a consequence of the offence, (c) a requirement to assist in repairing the environment, and (d) a requirement to conduct or to finance research to improve safety arrangements.[175]

3. *Environmental Hazards in the Workplace*

Workplace Hazardous Materials Information System

The development and implementation of a nation-wide system of information on hazardous materials in the workplace extended over the better part of the 1980s, largely as a consequence of the technical complexity involved and the constitutional division of relevant responsibilities. In 1982 a federal-provincial task force recommended that a combination of warning labels, data sheets on material safety and worker education programs would be required to address workplace hazardous materials comprehensively. Consultations involving governments together with representatives of labour and industry resulted in a more refined appreciation of the implementation issues at mid-decade. In 1988 the Workplace Hazardous Materials Information System (WHMIS) came into effect.

Through the combined operation of federal and provincial/territorial legislation, WHMIS establishes disclosure standards and worker education procedures which are intended to respect the legitimate concerns of suppliers and employers regarding confidential business infor-

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[173] *Transportation of Dangerous Goods Act, 1992*, S.C. 1992, c. 34 [hereinafter *TGDA, 1992*].

[174] In November 1991, the CCEM approved the implementation of a computerized monitoring system to track the movement of hazardous wastes in and out of the country. As the Canadian director of the International Association of Fire Fighters explained to the legislative committee on the draft bill, "the basic system for tracking hazardous materials would be really not much different from the system in place in our airports today that tracks passenger traffic." Legislative Committee E, *Orders* on Bill C-45, *An Act to promote public safety in the transportation of dangerous goods*, 30 April 1992.

[175] *TDGA, 1992*, *supra*, note 173, s. 34.

mation.[176] This reconciliation between workers' right to know about hazardous materials in the workplace and the confidentiality of certain business data is accomplished through exemption claims heard by the Hazardous Materials Information Review Commission. By March 1991, just over 1,300 claims had been registered, including approximately 300 from U.S. suppliers.[177] More recently, attention focused on the status of products originally excluded from WHMIS' operations, primarily because they were regulated elsewhere.[178]

Whistleblowers

To promote compliance with regulations governing the workplace, legislation protecting employees from certain forms of reprisal has been widely enacted. That is, employees who complain, report or otherwise act in response to problems or hazardous situations in the workplace have some statutory means of redress against dismissal or other penalties that might ensue.[179] Some extension of these forms of protection to the environmental context occurred during the 1980s.

In relation to environmental compliance, "whistleblower" provisions not only offer workers job security if they seek to protect themselves from personal risk, but may also have the effect of encouraging those with detailed knowledge of environmental practices in the workplace to serve the public interest by promoting employer compliance through internal or external reporting.[180] Proposals to extend the level of whistleblower protection and to increase the likelihood that environmental harm will figure more prominently in decisions about the workplace are now in circulation, especially in relation to Ontario's draft Environmental Bill of Rights.[181]

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[176] At the federal level, the creation of WHMIS involved amendments to the *Hazardous Products Act*, R.S.C. 1985, c. H-3, and the *Canada Labour Code*, R.S.C. 1985, c. L-1; provincial and territorial implementation was generally carried out through existing occupational health and safety regimes, for example, the *Occupational Health and Safety Act*, R.S.O. 1990, c. 0-1, and the *Workplace Hazardous Materials Information System*, O. Reg. 644/88.

[177] Hazardous Materials Information Review Commission, *Annual Report for the year ended 31 March 1991* (Ottawa, 1991) at 8.

[178] Listing is found in *Hazardous Product Act*, R.S.C. 1985, c. H-3, s. 3; *see also* Ministry of Consumer and Corporate Affairs, *Report to Parliamentary Committee on the Exclusions to the Workplace Hazardous Materials Information System (WHMIS)* (Ottawa, 1990).

[179] For list of federal, provincial and territorial reprisal protections, *see* H. Poch, *supra*, note 60 at 198, n. 4.

[180] *Environmental Protection Act*, R.S.O. 1990, c. E-19, s. 174(2) [hereinafter *OEPA*], and *Kraan* v. *Custom Muffler Ltd* v. *Ontario Ministry of the Environment (intervenor)*, [1985] O.L.R.B. REPORTS 3. *See also* Ontario Ministry of the Environment, Release, *Unjustly Fired Belleville Employee Receives Compensation Under Whistleblower Provision of Environment Protection Act* (19 December 1989).

[181] Poch, *supra*, note 60 at 218-19. Ontario, Ministry of the Environment *Report of the Task Force on the Ontario Environmental Bill of Rights* (Toronto: Queen's Printer, 1992) at 112-19.

4. *Spills*

Incidents with potential adverse environmental consequences will occur despite reasonable efforts to avoid them. As one provincial public information guide paints the scene: "Equipment failure, accidents on highways, railways or waterways, human error, third party involvement — any number of factors may combine to create a spill incident."[182] Moreover, in the absence of prompt and appropriate responses, environmental damage may extend beyond the immediate location of the spill, increasing both the difficulty and cost of restoration. But for a variety of substantive and procedural reasons, common law liability has provided an inadequate stimulus to immediate post-incident response.[183] Thus, during the 1980s several jurisdictions accepted the importance of remedial spills legislation.

Saskatchewan, in 1983, was first to implement legislation governing reporting and clean-up responsibilities for spills.[184] In November 1985, Ontario proclaimed its so-called "Spills Bill," taking the form of amendments to the province's *EPA* dating back to 1978.[185] As explained by early commentators, the spills legislation "should superimpose liability over the common law, where intent, fault, reasonable use, escape, extent of damage, duty of care and foreseeability are not in issue. Rather, the ownership and control of the spill pollutant is the primary question."[186] Problems of standing and foreseeability were addressed for purposes of spills with the obligation to compensate for all damages that are a direct result of the spill.[187]

To promote timely and effective measures in response to spills, the Ontario legislation proceeds on several fronts. Thus, a pollutant "spill" was broadly defined and the duties now arising in such an eventuality under the "Spills Bill" are such that "virtually any person could be affected by its provisions."[188] The legislation imposes a duty to give notice to the Ministry and others of the circumstances of the spill and of remedial action taken or proposed.[189] Where an "adverse effect" is

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[182] Environment Ontario, *Spills Response Program* (1988) 4; for information on the frequency, location, classification and causes of reported spills in Ontario, *see* the Spills Action Centre's annual reports of occurrences.

[183] J.W. Harbell, *Common Law Liability for Spills* in S.M. Makuch, ed., THE SPILLS BILL: DUTIES, RIGHTS AND COMPENSATION (Toronto: Butterworths, 1986).

[184] *Environmental Management and Protection Act*, S.S. 1983-84, c. E-10.2.

[185] For references to debate and controversy surrounding the "Spills Bill", especially in relation to concerns about liability insurance, *see* Nemetz, *supra*, note 10 at 583.

[186] Harbell, *supra*, note 183 at 25.

[187] Compensable damages include personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income.

[188] Estrin, *supra*, note 77 at 5; the provisions are directed at abnormal discharges and have been held not to apply to discharges which occurred prior to proclamation on 29 November 1985 — *see McCann* v. *Environmental Compensation Corporation* (1990), 5 C.E.L.R. (N.S.) 247 (Ont. C.A.).

[189] *OEPA*, *supra*, note 123, s. 92.

associated with the spill, owners and persons having control of the pollutant prior to the spill have clean-up responsibilities requiring them to do "everything practical to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment." But where appropriate actions are not forthcoming, the Minister has extensive authority to direct that suitable actions be taken by agents or employees of the Ministry or by others. Although strict liability applies to loss or damage from spills, the liability of owners and controllers of spilled pollutants is absolute in relation to the costs of clean-up.[190]

5. *Toxic Waste Management*

A survey conducted as the 1980s began estimated annual Canadian production of hazardous wastes requiring special treatment and detoxification at 3.3 million tonnes. Just under half of this material was generated in Ontario from approximately 16,000 identifiable sources.[191] The challenge of dealing with this volume of hazardous materials was described in 1985 as "the single most important environmental issue facing Canadians today." [192]

Significant advances made during the past decade to improve the quality of inventory and analysis of hazardous industrial wastes have increased the sophistication and reliability of classification and identification procedures. More is known about sources, volumes and waste distribution practices with the result that continuous refinements in handling and disposal requirements are being formulated. From a legal perspective the essential elements of the evolving regimes involve waste classification schemes, registration of waste generators, labelling or manifest and transport controls along with intensified scrutiny of disposal facilities and technologies. Overall, the arrangements are characterized by a high degree of technical complexity in keeping with the distinctive characteristics of various toxic waste materials.[193]

In response to greatly increased public concern relating to toxic waste and to more general concern about waste volume and the importance of waste reduction and recycling, several provinces have been involved in ongoing revision of their waste legislation. The changes have often sought to expand or clarify the concept of waste to include "materials" and to impose more stringent handling and approvals requirements for toxic and special wastes. For example, British Columbia's *Waste Management Act* of 1982[194] experienced frequent amendments in

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[190] Estrin, *supra*, note 77 at 186-87; S.M. Makuch *The Spills Bill — An Overview*, in S.M. Makuch, ed., *supra*, note 183, 27 at 31-33.

[191] D. Chant, *Management and Disposal of Toxic Wastes* in MANAGING THE LEGACY: PROCEEDINGS OF A COLLOQUIUM ON THE ENVIRONMENT (Ottawa: Economic Council of Canada, Supply & Services Canada, 1986) 47 at 48.

[192] *Ibid.* at 47.

[193] Estrin, *supra*, note 77; R.R.O. 1990, Reg. 347 (formerly Reg. 309) "General-Waste Management" as amended.

[194] S.B.C. 1982, c. 41.

the decade following its enactment as legislative initiatives were taken to regulate the transport and disposal of "special wastes", to clarify issues of ownership and responsibility, to promote the remediation of sites contaminated with special wastes and to finance clean-up and care of waste management facilities through a Waste Management Trust Fund.

Industrial and commercial operations are now also being urged to participate in waste reduction action plans (WRAPs) and recycling. Although these latter initiatives are primarily directed at non-hazardous solid wastes, including packaging, "hazardous recyclables" are receiving special attention.[195] As a supporting measure, waste audits of non-hazardous solid wastes are being encouraged in some jurisdictions.[196]

6. *Count Down to Zero*

"By and large", Paul Muldoon observed, "pollution control laws in Canada still accept the basic assumption that waste is an inevitable consequence of the industrial process and that the key to good regulatory policy is to properly 'manage' it."[197] Notwithstanding advances in "management" the necessity for significant reduction or virtual elimination of certain toxic discharges has become increasingly apparent. For some substances, only "zero discharge" may satisfy the standard of long-term sustainability. Advances in the direction of zero discharge have been made on a regional level under the *Great Lakes Water Quality Agreement, 1978* and amendments, supported in Canada by federal-provincial and interprovincial agreements.[198]

The change during the decade in regulatory efforts to control toxic water pollution is suggested by a series of transformations now underway: from a medium-specific to a cross-media approach; from waste management to source reduction; from allowable concentrations to absolute load reductions; from point-source to non-point source pollution control; from jurisdictional diversity to an ecosystem approach.[199]

In 1986 Ontario initiated discussion concerning the Municipal Industrial Strategy for Abatement (MISA), a program which has subsequently been described as the "keystone" of the province's efforts to control discharges into surface waters. As graphically explained by the Hon. Jim Bradley, "Just as polite society once accepted spitting in public — indeed accepted it indoors — so society once accepted pollution. That

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[195] *Environmental Enhancement and Protection Act*, S.A. 1992, c. E-13.3, ss. 161-68; *see also Waste Reduction and Prevention Act*, S.M. 1989-90, c. 60.

[196] *Environmental Protection Act*, R.S.O. 1990, c. E-19, s. 176(4).

[197] Muldoon, *supra*, note 97 at 133.

[198] *Ibid.* at 137.

[199] P. Muldoon & M. Valiante, TOXIC WATER POLLUTION IN CANADA: REGULATORY PRINCIPLES FOR REDUCTION AND ELIMINATION WITH EMPHASIS ON CANADIAN FEDERAL AND ONTARIO LAW (Calgary: Canadian Institute of Resources Law, 1989).

is no longer the case. Our government is removing the spittoons from Ontario's environmental living room."[200]

MISA approached the challenge on a sectoral basis, first requiring each of nine general industry groups to conduct detailed monitoring of specific pollutants.[201] On the basis of monitoring — a process whose costs have already been substantial — the second phase of MISA will establish enforceable effluent limits. Effluent limit regulations, to be drafted through Joint Technical Committees, will aim for results obtainable by the best available technology which is economically achievable. Thus, on the basis of periodic review, more stringent effluent limits or even elimination of certain contaminants can be expected.[202]

Better information about the risks associated with particular toxics combined with the budgetary and resource constraints facing regulators has stimulated efforts aimed at priority-setting, an exercise appropriately described as "worst things first."[203] Candidates for elimination have been identified in Ontario and other jurisdictions through several processes, and consultations regulating certain phase-outs are underway.[204] British Columbia regulations on organochlorines from pulp mills in the province establish a schedule for elimination with the support of economic analysis suggesting that associated economic costs need not be disruptive to industry.[205]

7. *Tidying Up the Toxics Legacy*

Various accidental discoveries and more systematic inquiries about the distribution of toxics exposed extensive historic damage to the environment and refuted the wishful thinking of those who may have regretted past practices but had assumed that nature would take care of the clean-up. In fact, however much it had been hoped that environmental law and policy might focus on preventive measures, the 1980s revealed a toxic legacy that demands a costly and substantial response.

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[200] J. Bradley, Ontario Minister of the Environment, "Notes for Remarks to the Lambton Industrial Society" (26 May 1988).

[201] Electric Power Generation, Industrial Minerals, Inorganic Chemicals, Iron and Steel Manufacturing, Metal Casting, Minerals, Organic Chemicals, Petroleum Refining, and Pulp and Paper.

[202] MUNICIPAL-INDUSTRIAL STRATEGY FOR ABATEMENT (MISA): A POLICY AND PROGRAM STATEMENT OF THE GOVERNMENT OF ONTARIO ON CONTROLLING MUNICIPAL AND INDUSTRIAL DISCHARGES INTO SURFACE WATERS (Toronto: Ontario Ministry of the Environment, 1986); Hon. J. Bradley, Ontario Minister of the Environment, *Notes for Remarks* (Address to the Lambton Industrial Society, 26 May 1988).

[203] J.S. Applegate, *Worst Things First: Risk, Information, and Regulatory Structure in Toxic Substances Control* (1992) 9 YALE J. ON R. 277.

[204] CANDIDATE SUBSTANCES LIST FOR BANS OR PHASE-OUTS: REPORT (Toronto: Ontario Ministry of the Environment, 1992).

[205] West Coast Environment Law Association, ANNUAL REPORTS AND FINANCIAL STATEMENTS, 1991-92, (Vancouver, West Coast Environmental Law Association, 1992) 5; B.C. Reg. 13/92, 17 January 1992; Sinclair, *supra*, note 65.

Following the announcement of federal funding in October 1989, the Canadian Council of Ministers of the Environment initiated the National Contaminated Sites Remediation Program. The jointly-funded, $250 million program was designed to pursue three objectives over a five year period: to promote the remediation of contaminated lands on the basis of the "polluter pays principle"; to encourage the development of innovative remediation technologies; and to fund the clean-up of abandoned or "orphan" sites that pose high risks.[206] The "orphan" category includes about fifty of the estimated thousand contaminated sites which had been identified when the program was established. In addition, the federal government committed $25 million to sites where federal departments and agencies were responsible for the contamination.[207]

Legislative authority to impose liability for clean-up or associated costs on private parties has been examined and reviewed in connection with the National Contaminated Sites Remediation Program or particular incidents such as the Hagarsville tire fire. Statutory provisions respecting administrative and judicial restoration orders are being implemented or refined across the country, and guidelines with respect to clean-up and decommissioning have frequently been formulated to forestall the future proliferation of contaminated "orphan" properties.[208] Those potentially responsible for clean-up are particularly sensitive to the financial implications of these measures. Thus, the standards expected for remediation and rehabilitation of contaminated lands are now receiving close scrutiny, and have been judicially examined.[209] Clean-up requirements under Ontario's Gasoline Handling Act were recently described as "far too onerous" for the purposes of establishing the civil liability of a vendor to a subsequent owner and, added the court, "may, for all practical purposes, be unattainable."[210]

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[206] G. Létourneau & B.A. Chomyn, *Contaminated lands: a Canadian perspective* (1991) 32 LES CAHIERS DE DROIT 1073 at 1076.

[207] Environment Canada, Press Release PR-HQ-089-46, *Federal Government Puts up $150 million for Federal-Provincial Programs to Clean-Up Abandoned Contaminated Land Sites* (16 October 1989); G.P. Hill, *The National Contaminated Sites Remediation Program* in CLEAN-UP OF CONTAMINATED SITES: REGULATIONS AND STATE-OF-THE-ART TECHNOLOGIES (Mississauga, Ont.: Insight Press, 1991).

[208] *Canadian Environmental Protection Act*, R.S.C. 1985, c. C-16 (4th Supp.), s. 130(1)(b) and (g); *Ontario Environmental Protection Act*, R.S.O. 1990, c. E-19, ss. 17, 97 & 190; *Environment Quality Act*, R.S.Q. 1977, c. Q-2; *see also* W. Braul, *New Directions in Regulating Contaminated Sites: A Discussion Paper* (Victoria: Environmental Protection Division, B.C. Ministry of the Environment, 1991); D. Bisson, *Site Decommissioning and Remediation* (1992) 3:4 ENV. L. ALERT 1.

[209] Ontario Law Reform Commission, REPORT ON DAMAGES FOR ENVIRONMENTAL HARM (Toronto: Ontario Law Reform Commission, 1990); D. Saxe, *Reflections on Environmental Restoration* (1991) 2 J.E.L.P. 77.

[210] *McGeek Enterprises* v. *Shell Canada Ltd* (1991), 6 O.R. (3d) 216 at 222-23, 8 C.E.L.R. (N.S.) 138 at 145 (Gen. Div.).

8. *Victim Compensation*

Analysis of the difficulties associated with assessing damages and determining liability for compensating the victims of environmental injuries, notably those involving toxic and hazardous substances, led to a variety of remedial proposals.[211] While the subject of victim compensation is still considered "a grey area that has not been addressed in detail by legislation,"[212] innovative arrangements have begun to appear. For example, the Ontario Environmental Compensation Corporation was established in connection with the province's spills legislation.[213] The ECC has provided assistance in the form of information and procedural advice, and has made payments to victims who were not otherwise able to secure compensation.[214]

Following more than a decade and a half of intermittent and difficult negotiations, a settlement of the English and Wabigoon Rivers mercury pollution claims, involving the federal and provincial governments, the forest products companies and the Indian communities, was finally reached in November 1985.[215] The settlement, whose implementation ultimately required legislative confirmation, provided for the creation of a special tribunal charged with the administration of mercury poisoning compensation applications by members of the Islington and Grassy Narrows Indian Bands. The problematic issues of causation and entitlement to damages were resolved in the settlement by an agreement about the "known conditions" of mercury poisoning and by permitting the tribunal to determine eligibility on the basis of symptoms, signs or conditions which are:

> reasonably consistent with mercury poisoning and capable of significantly impairing the quality of life or limiting the activities of the applicant.[216]

The settlement limited the financial obligations of the forest industry companies, placed the Ontario government in the position of underwriting costs exceeding the initial capacity of the fund to satisfy them, and eliminated any existing and future rights of action of the Bands or

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[211] J. Swaigen, COMPENSATION OF POLLUTION VICTIMS IN CANADA: A STUDY PREPARED FOR THE ECONOMIC COUNCIL OF CANADA (Ottawa: Supply & Services Canada, 1981); Ontario Law Reform Commission, *supra*, note 209.

[212] Létourneau & Chomyn, *supra*, note 206 at 1108.

[213] Estrin, *supra*, note 77 at 201-14.

[214] During the 1990-91 fiscal year, the ECC worked with over three hundred victims and authorized payments totalling approximately $100,000 to twelve applicants [Source: ONTARIO ENVIRONMENTAL COMPENSATION CORPORATION ANNUAL REPORT 1990/91 (Toronto: Environmental Compensation Corporation, 1991) 2].

[215] For history and background on the situation, *see* A.M. Shkilnyk, A POISON STRONGER THAN LOVE: THE DESTRUCTION OF AN OJIBWA COMMUNITY (New Haven, CT: Yale University Press, 1985).

[216] *English and Wabigoon River Systems Mercury Containment Settlement Agreement Act, 1986*, S.O. 1986, c. 23, s. 1, definition of "condition".

their individual members "in respect of any claims and causes of action which are the subject of the settlement."[217]

At the federal level, *CEPA* authorizes court orders to require a convicted offender to compensate an aggrieved person for loss or damage to property that resulted from commission of the offence. *CEPA* also provides a civil cause of action for damages due to conduct that contravenes the Act.[218]

Compensation provisions previously established under the *Nuclear Liability Act* were challenged on several grounds, including inconsistency with sections 7 and 15 of the *Charter*, and reforms to the statutory limitation period and the $75 million claims ceiling have been proposed.[219] As summarized by the Court of Appeal in preliminary proceedings, the applicants argued that the compensation ceiling actually promotes the use of nuclear energy:

> The thrust of the evidence is that the development of nuclear energy is encouraged by the Act, and may even be dependent upon the limitations of liability contained within it. Insurance or other forms of security against potential claims would be needed throughout the industry without the protection of the Act and this would add measurably to the costs of nuclear energy development, encouraging implementation of alternative energy sources. Thus a link is put between the Act and the creation and proliferation of nuclear reactors.[220]

Overall, the foundations for a comprehensive and more systematic approach to the control of toxic substances have been greatly strengthened during the period covered in this survey. More information on toxics and their behaviour in the environment stimulated a fundamental re-thinking of management and control practices. And, although the implementation of precise regulatory measures and progress towards the elimination of certain high risk substances has hardly been expeditious, momentum has been established. Meanwhile, the challenge of identifying historically contaminated sites and promoting clean-up through technological innovation and financial support has also come into focus.

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[217] *Ibid.*, preamble; *see also* Sigurdson, *supra*, note 69; West, *supra*, note 69.

[218] *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.), ss. 131(1), 136(1).

[219] *Energy Probe* v. *Canada (A.G.)* (1989), 58 D.L.R. (4th) 513, 68 O.R. (2d) 449 (C.A.), leave to appeal to Supreme Court of Canada denied ([1989] S.C.C.A. No. 223); D. Poch *The* Nuclear Liability Act*: Nuclear Power Versus Legal Rights* in Report of the Canadian Bar Association, SUSTAINABLE DEVELOPMENT IN CANADA: OPTIONS FOR LAW REFORM (Ottawa: The Canadian Bar Association, 1990) 98; *Nuclear Liability Act*, R.S.C. 1985, c. N-28.

[220] *Energy Probe* v. *Canada (A.G.)*, *ibid.*, at 452-55.

III. Environmental Assessment: Retrenchment and Reinvigoration

A. *Introduction*

"[T]he systematic description, prediction, evaluation, and integrated presentation of the environmental effects of a proposed action at a stage where serious environmental damage may be avoided or minimized"[221] has never been as straightforward a task as this definition of environmental assessment might suggest. In "changing the focus from regulation and control to planning and prevention,"[222] environmental assessment procedures — introduced to Canadian jurisdictions about twenty years ago — spawned remarkably intense conflict during the 1980s. Since the date of this journal's last environmental survey, several jurisdictions have seen their arrangements for environmental assessment subjected to close scrutiny; not infrequently, these arrangements have become the centre of public controversy.

To an important degree administrative agencies responsible for environmental assessment contributed to the refinement of their own procedures and standards through the ongoing process of decision-making and regulation;[223] however, the most celebrated activity took place in the courts where native and environmental groups or concerned individuals challenged the manner in which environmental assessment was being carried out, or alternatively, not being carried out. In fact, Donna Tingley advanced the opinion that "the real environmental law story of the 1980s will be the 'EARP litigation', that is, the legal efforts by environmentalists to force the federal government to apply its 'Environmental Assessment and Review Process Guidelines Order'."[224]

The 1984 EARP Guidelines Order was the result of pressure through the late seventies and early eighties for changes to federal environmental assessment arrangements which had been put in place about ten years earlier.[225] The 1984 Guidelines Order — a document of uncertain legal authority[226] — preserved a process of self-assessment whereby "initiating departments" screened proposals over which they exercised deci-

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[221] R. Lang, *Environmental Impact Assessment: Reform or Rhetoric?* in W. Leiss, ed., Ecology versus Politics in Canada (Toronto: University of Toronto Press, 1979) 233.

[222] M.I. Jeffery, *The New* Canadian Environmental Assessment Act — *Bill C-78: A Disappointing Response to a Promised Reform* (1991) 36 McGill L.J. 1070.

[223] B.E. Smith, *Practice and Procedure Before the Environmental Assessment Board* (1982) 3 Advocates' Q. 195.

[224] Tingley, *supra*, note 32 at 146.

[225] SOR/84-467, 22 June 1984; a history of the background developments may be found in T. Fenge & L.G. Smith, *Reforming the Federal Environmental Assessment and Review Process* (1986) 12 Can. Pub. Pol. 596.

[226] A.R. Lucas in *The New Environmental Law* in R.L. Watts & D.M. Brown, eds., Canada: The State of the Federation 1989 (Kingston, Ont.: Queen's University, Institute of Intergovernmental Relations, 1989) 167 at 179 observes: "It had generally been assumed that the result was a set of guidelines that were not formal regulations issued under clear statutory authority and consequently not legally binding."

sion-making powers. Ordinarily environmental assessment ended at this point. However, in cases where important adverse impacts were anticipated, where the potential adverse environmental effects were unknown, or where public concern so indicated, the initiating department would refer the proposal to the Minister of the Environment who could create a review panel. Review panel reports together with recommendations were eventually forwarded to the Minister and to the initiating department where responsibility for decision-making continued to reside.

Since the time of the Guidelines Order, Ottawa and several provinces have again seen major reform proposals, a number of which are now at or near the point of implementation. In many respects this activity reflects the broader preoccupations of the period. At the outset of the decade American deregulation and subsequent concern within Canada about economic efficiency and international competitiveness supported calls for streamlining and coordinating whatever regulatory programs survived the enthusiasm to "get government off our backs"; in due course the publication of the *Brundtland Report* and growing awareness of cumulative and global environmental deterioration bolstered counter-pressures to use assessment still more comprehensively to modify the nature of development in the direction of sustainability. Thus, major forces of retrenchment and reinvigoration met in the environmental assessment reform process. Several of the principal environmental assessment controversies of the 1980s demonstrated that the stakes were high.

B. *The Public Controversies*

1. *Rafferty-Alameda*

Encouraged by the support of United States authorities, Saskatchewan Premier Grant Devine announced in 1986 the province's intent — subject to environmental approvals — to construct flood control and irrigation dams on the Souris River, a waterway flowing from Saskatchewan through North Dakota and eventually into Manitoba. Although local environmentalists challenged aspects of an environmental review of the Rafferty and Alameda dams conducted by the province, in June 1988 the federal Minister of the Environment as the responsible authority under the federal *International Rivers Improvements Act* approved a license application submitted by the Saskatchewan Water Corporation.[227] The Canadian Wildlife Federation challenged the license on the grounds that the Guidelines Order had not been followed.

In a judgment that surprised most officials and observers, Mr Justice Cullen of the Federal Court Trial Division concluded that the

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[227] *Assn. of Stop Construction of Rafferty Alameda Projects Inc.* v. *Saskatchewan (Minister of Environment and Public Safety)* (1988), 3 C.E.L.R. (N.S.) 236 (Sask. Q.B.); *International River Improvements Act*, R.S.C. 1985, c. I-20 [hereinafter *IRIA*].

EARP Guidelines Order was "not a mere description of a policy or program; it may create rights which may be enforceable by way of mandamus."[228] Finding the guidelines applicable to the Minister's decision under the *IRIA*, Cullen J. quashed the Saskatchewan Water Corporation license in April 1989.

In the immediate aftermath, the Minister announced an assessment to be undertaken by departmental officials and soon released a "Draft Summary Initial Environmental Evaluation" which formed the basis of an intensive community consultation program in late June. Two months later, the Minister issued a second license, only to be advised by Mr Justice Muldoon in a further round of judicial review proceedings that a formal review panel would be required to "unscramble the omelette which has been made of the *EARP Guidelines* in this case."[229] On December 28, 1989, Muldoon J. ordered the second license quashed effective 30 January 1990 unless the federal government had by that time made arrangements for a review panel.[230]

Then, by agreement with Saskatchewan, a panel was appointed and work stopped on the project; the federal government undertook to pay the province for the delay. Several months later the panel suspended operations in response to certain excavation work being carried out on the project. Panel members later resigned and the province resumed development. Federal disarray was exposed through an unsuccessful effort by Canada to compel the Saskatchewan Water Corporation to await the completion of a review by a then non-existent panel.[231] Local ranchers whose property was subject to expropriation and flooding were eventually more successful in injunction proceedings against the development of the Alameda dam.

2. *Oldman River*

The Alberta government's interest in managing the waters of the Oldman River dates from at least the 1950s. In 1987, after provincial departments, including Environment, completed studies on water management and storage plans for the Oldman River,[232] Alberta obtained

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[228] *Cdn Wildlife Federation Inc.* v. *Canada (Minister of the Environment)* (1989), 3 C.E.L.R. (N.S.) 287 at 300 (F.C.T.D.); *aff'd* (1989), 4 C.E.L.R. (N.S.) (F.C.A.).

[229] *Cdn. Wildlife Federation Inc.* v. *Canada (Minister of the Environment)* (1989), 4 C.E.L.R. (N.S.) 201 at 226 (F.C.T.D.).

[230] *Ibid.* An appeal and a cross appeal were dismissed, *Canadian Wildlife Federation Inc.* v. *Canada (Minister of the Environment) and Saskatchewan Water Corp.* (1990), 121 N.R. 385 (F.C.A.); the creation of the panel in late January forestalled the need to grant mandamus, *Canadian Wildlife Federation Inc. et al.* v. *Canada (Minister of the Environment) and Saskatchewan Water Corp.* (1991), 40 F.T.R. 114 (F.C.T.D.).

[231] *Canada (A.G.)* v. *Saskatchewan Water Corp.* (1990), 5 C.E.L.R. (N.S.) 252 (Sask. Q.B.).

[232] The planning and assessment stages of water management in the Oldman River basin are described in the decision of the Supreme Court of Canada (*Friends of the Oldman River Society* v. *Canada (Minister of Transport)*), *infra*, note 237.

from the federal Minister of Transport approval required by the *Navigable Waters Protection Act* for a proposed dam.[233] Again, federal decision-makers deferred to provincial environmental assessment, in this case on the basis of an explicit intergovernmental agreement providing that "each party is to rely upon the other to take account of the interests of the other when dealing with a project that falls under the first party's jurisdiction."[234]

An association known as the Friends of the Oldman River Society, having been unsuccessful in repeated attempts to persuade federal agencies to initiate environmental impact assessment, and having failed to obtain any satisfaction from Alberta courts,[235] took its concerns to the Federal Court. The Friends applied for *certiorari* to quash the approval issued by the Minister of Transport and for *mandamus* to require the Department of Transport as well as the Department of Fisheries and Oceans to undertake an environmental assessment pursuant to the 1984 EARP Guidelines Order.[236] The Friends argued that the Guidelines Order applied to the federal departments and that significant federal interests including navigable waters, fisheries, Indians and Indian lands would be affected by the proposed development.

In an eight to one decision, the Supreme Court of Canada concluded in January 1992 that the Guidelines Order had been validly enacted under section 6 of the *Department of the Environment Act* and that its application in the circumstances was mandatory.[237] That is, in connection with decision-making responsibility under the *Navigable Waters Protection Act*, the Department of Transport as the "initiating department" had a duty to address environmental considerations as identified in the Guidelines Order in all areas of federal jurisdiction. Opposing arguments that the provinces were actually immune from federal environmental assessment and challenges to the scope of federal authority for environmental assessment were rejected.

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[233] The federal approval was based on the authority of section 5(1) of the *Navigable Waters Protection Act*, R.S.C: 1985, c. N-22, which provides that:

> No work shall be done or placed in, on, over, under, through or across any navigable water unless
> (a) the work and the site plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction....

[234] Statement of Raymond Robinson, *Minutes of Proceedings and Evidence of the Standing Committee on Environment* 2nd Sess., 34th Parl., 1989, Issue No. 1 at 1:35.

[235] *Friends of Oldman River Society* v. *Alberta (Minister of Environment)* (1987), 56 ALTA. L.R. 368 (Q.B.); *Friends of Oldman River Society* v. *Alberta (Energy Resources Conservation Board)* (1988), 58 ALTA. L.R. (2d) 286 (C.A.).

[236] *Friends of Oldman River Society* v. *Canada (Minister of Transport)*, [1990] 1 F.C. 248 (T.D.); *Friends of Oldman River Society* v. *Canada (Minister of Transport)*, [1990] 2 F.C. 18 (C.A.).

[237] *Friends of the Oldman River Society* v. *Canada (Minister of Transport)* (1992), 88 D.L.R. (4th) 1, [1992] 2 W.W.R. 193 (S.C.C.) [hereinafter *Oldman* cited to W.W.R.].

3. *James Bay*[238]

Following an extended period of energy surpluses, Quebec experienced renewed pressure for the development of northern water powers after the 1985 re-election of Robert Bourassa's Liberal government. Hydro Quebec announced contemplation of two massive projects, collectively known as James Bay II: one of these involves the Nottaway-Broadback-Rupert (NBR) rivers systems, while the other is centred on the Great Whale watershed. To create markets for power anticipated from the James Bay II projects, Hydro Quebec promoted long-term export sales to American utilities in the northeast and sought to attract investment by electricity intensive industries, notably smelting plants.[239] The NBR and Great Whale developments are south and north respectively of earlier diversions and hydro projects involving the La Grande River where controversy concerning the status of the Eastmain River continues.[240]

The James Bay and Northern Quebec Agreement of 1975 provided for Cree and Inuit participation in environmental and social assessment of development in parts of the territory covered by the agreement. On lands south of the fifty-fifth parallel, Cree representatives sit on the James Bay Advisory Committee on the Environment, while developments north of the fifty-fifth parallel are considered by the Environment Quality Commission which included Inuit members. For purposes of environmental assessment, matters relating to federal jurisdiction were assigned to a designated administrator, the Chair of the Federal Environmental Assessment and Review Office.

When the federal authority showed reluctance to exercise responsibility in connection with the Great Whale proposal, the James Bay Cree initiated a series of legal actions against the Great Whale project, arguing in particular for more substantial and comprehensive environmental assessment than either the federal or Quebec governments had contemplated and insisting on an independent parallel federal review.[241] Following a number of native successes in the courts, agreement was eventually reached on a joint assessment involving several institutions and organizations.[242] Meanwhile, in the aftermath of extensive lobbying by Cree officials and representatives, New York State

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[238] *See* J. de Pencier, *Oldman River Dam and Federal Environmental Assessment Now and in the Future* (1992) 2 J.E.L.P. 293 at 299; Vanderzwaag & Duncan, *supra*, note 33.

[239] R. Mainville, *The James Bay and Northern Quebec Agreement* in Ross & Saunders, eds., GROWING DEMANDS ON A SHRINKING HERITAGE: MANAGING RESOURCE-USE CONFLICTS 176.

[240] *Eastmain Band* v. *Robinson* (1992), 9 C.E.L.R. (N.S.) 257 (F.C.A.).

[241] *Cree Regional Authority* v. *Canada (Federal Administrator)*, [1991] 3 F.C. 533, 81 D.L.R. (4th) 659 (C.A.); *Grand Council of Crees of Quebec* v. *Canada (A.G.)* [1991], R.J.Q. 922.

[242] A. Picard, "Great Whale project to get review" *The [Toronto] Globe and Mail* (25 January 1992) A8.

withdrew approval of a proposed hydroelectric power purchase from Quebec.

4. *The DND and the Innu*

A 1986 agreement between Canada and several NATO partners contributed to an accelerating increase in the frequency of low level flights over Labrador to train bomber pilots. The area had already been the site of such flying for several decades, when Canada envisaged the development of an integrated NATO training centre at Goose Bay and actively competed for the proposed facility against an alternate site in Turkey. Labrador Innu were highly critical of the potential social disruption and environmental impacts in their homeland, Nitassinan.

Innu resistance to low level flights — including civil disobedience — intensified as a costly environmental assessment carried out for Department of National Defence, the initiating department, was found to contain serious flaws. Recommendations by an EARP panel to place an interim cap on the frequency of flights while deficiencies in the assessment were remedied were ineffective, and an injunction application by the Naskapi-Montagnais Innu association also failed.

The Federal Court rejected the applicants' argument that section 3 of the Guidelines Order obliged DND to halt work while the panel completed its review of the assessment. On the basis of potential economic harm to the civilian community of Goose Bay-Happy Valley and lack of "concrete evidence that the low level flying as presently being carried out is causing extensive environmental damage" the court declined to issue the injunction.[243]

5. *Timber Resources and Forest Management*

Issues surrounding the state and fate of forests across Canada provided some of the more volatile environmental controversies of the 1980s.[244] Centered at the start of the decade on the competing claims of resource industries, aboriginal communities and recreational users, disputes about forest management were readily reformulated after the publication of the *Brundtland Report* in terms of sustainability. However the issues were formulated, significant rifts emerged between the perspectives of industry and most professional foresters on the one hand

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[243] *Naskapi-Montagnais Innu Assn.* v. *Canada (Minister of National Defence)*, [1990] 3 F.C. 381 (T.D.) at 406 [hereinafter *Naskapi*]; Justice Reed's analysis was quoted at length with approval by the Federal Court of Appeal in *Canadian Wildlife Federation Inc.* v. *Canada (Minister of the Environment)* (1990), [1991] 1 F.C. 641 (C.A.); *see also* M. Wadden, NITASSINAN: THE INNU STRUGGLE TO RECLAIM THEIR HOMELAND (Vancouver: Douglas & McIntyre, 1991).

[244] E. May, PARADISE WON: THE STRUGGLE FOR SOUTH MORESBY (Toronto: McLelland & Stewart, 1990); B.W. Hodgins & J. Benidickson, THE TEMAGAMI EXPERIENCE: RECREATION, RESOURCES AND ABORIGINAL RIGHTS IN THE NORTHERN ONTARIO WILDERNESS (TORONTO: UNIVERSITY OF TORONTO PRESS, 1989).

and the views of the general public in relation to the issues of timber supply, the use of chemical pesticides, the protection of old growth, and the suitability of clear cutting.[245]

One long-standing forest-based inquiry reached a conclusion in June 1985 when the Royal Commission on the Northern Environment presented its final report to the Ontario Minister of Environment.[246] The Hartt/Fahlgren study raised questions about forest management in Ontario's northern forests and cast doubt on proposals emanating from the Ministry of Natural Resources for a class assessment of forest management practices, including cutting practices. The RCNE asked:

> How can one propose a class or general assessment of a cutting method when its environmental effects are most likely to be local and specific in nature, dependent on soil attributes, and thickness, ground cover, topography, slope, drainage patterns, water courses and climate, to name some of the probable operative factors? What must first occur are actual assessments under the Environmental Assessment Act for proposed cutting methods for a representative variety of forest areas.[247]

A class environmental assessment for timber management in Ontario was submitted for consideration in 1987, however, and elaborate proceedings began. Background developments leading up to this application had been underway for several years in advance.[248] The assessment process represented a welcome and important opportunity for those responsible for the management and administration of Crown forests to account for their stewardship more systematically than ever before. But with the proceedings only barely under way, commentators identified what appeared to be fundamental limitations in the Ministry of Natural Resources approach. The questions raised addressed the distinction between timber management and comprehensive forest management issues, the problematic relationship between a timber management class assessment and the underlying challenge of land use conflict, and the role of sustainability in the overall scheme. It is now anticipated that the EAB report on timber management will be available in the fall of 1993.

British Columbia's experience with forest use decision-making was at least as problematic as Ontario's, for clashes between logging and native and environmental interests on Mere's Island, South Moresby and in the wilderness valleys of the Carmanah, Walbrun and Stein Rivers among other locations attracted not only national but international attention. British Columbia addressed concern about forest management by means of a Forest Resources Commission whose work from 1989-92

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[245] Forestry Canada, THE STATE OF FORESTRY IN CANADA: 1990 REPORT TO PARLIAMENT (Ottawa: Supply & Services Canada, 1991).

[246] Ontario, Royal Commission on the Northern Environment, *Final Report and Recommendations* (Ont. Ministry of the Attorney General, June 1985) (Commissioner: J.E.J. Fahlgren) [hereinafter *RCNE Final Report*].

[247] *Ibid.* at 5-27.

[248] J.A. Dunster & R.B. Gibson, FORESTRY AND ASSESSMENT: DEVELOPMENT OF THE CLASS ENVIRONMENTAL ASSESSMENT FOR TIMBER MANAGEMENT IN ONTARIO (Toronto: Canadian Institute for Environmental Law and Policy, 1989).

resulted in eleven volumes of background papers and a series of recommendations regarding a code of forest practices, land use planning and other related considerations. The proposals were intended to respond to the Commission's conclusion that "past failure to recognize and adequately manage for forest values other than timber and to manage more intensely for timber values has put the very existence of B.C.'s largest economic sector at risk."[249]

The Commission's work formed one element of the background to the creation in 1992 of the Provincial Commission on Resources and Environment (CORE). CORE, chaired by British Columbia Ombudsman Steven Owen has undertaken a three-fold challenge. To develop a province-wide land use strategy; to promote implementation of regional planning processes involving community participation and to provide for the monitoring of such processes; and to encourage the coordination of government initiatives in order to ensure that resource and environmental management are effectively integrated.[250]

Alberta, not widely regarded in the public mind as a major player in terms of Canadian forestry, nevertheless generated a particularly acute clash when plans for a bleached craft pulp mill on the Athabasca River in Northern Alberta became the subject of environmental assessment proceedings.[251] This experience was a significant influence on the reform of environmental assessment in the province.[252]

C. *Divergent Expectations and the Design of the Process*

Expectations concerning what environmental assessment should accomplish have been diverse. Consequently, comprehensive evaluations and consistent explanations for the performance of the various environmental assessment processes are still very much in dispute. For some, the process of environmental assessment may be a comparatively modest undertaking which "attempts to identify and predict the impacts of legislative proposals, policies, programs, projects and operational procedures on the biogeophysical environment and on human health and well-being. It also interprets and communicates information about those impacts and investigates and proposes means for their management."[253]

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[249] Forest Resources Commission of British Columbia, *Concluding Comments* (July 1992).

[250] S.A. Kennett, "Is British Columbia Leading the Way in Natural Resources Management?" *Resources: The Newsletter of the Canadian Institute of Resources Law* (No. 40, Fall 1992) 1.

[251] The Alberta-Pacific Environmental Impact Assessment Review Board, THE PROPOSED ALBERTA-PACIFIC PULP MILL: REPORT OF THE EIA REVIEW BOARD (Edmonton: Alberta Environment, 1990); P. Edwards, THE AL-PAC REVIEW HEARINGS: A CASE STUDY (Edmonton: Environmental Law Centre, 1990).

[252] *See* notes 307-10, *infra*, and accompanying text.

[253] Canadian Environmental Assessment Research Council, *Evaluating Environmental Impact Assessment: An Action Prospectus* (Ottawa: Department of Supply & Services, 1988) at 1 as cited in P.S. Elder & W.A. Ross, *How to Ensure that Developments are Environmentally Sustainable* in J.O. Saunders, ed., *supra*, note 2, 124 [hereinafter Elder & Ross] at 127, n. 17.

Yet in some circumstances environmental assessment has also been characterized as a "remarkably broad" procedure offering "the promise of a systematic, comprehensive public review of all the factors making up a decision that may have adverse environmental consequences" and which has made politicians apprehensive that it "will change, if not undermine, established modes of private and public decision-making."[254]

Within the context of these competing perceptions of environmental assessment as being either essentially affirmatory of developmental initiatives or potentially transformative, the designers of environmental assessment regimes have had to address a number of generic components: to what activities should the environmental assessment regime apply? by whom should the evaluation be carried out, and with what level of public involvement? according to what standard? will assessment documents be subject to some further process of review and scrutiny? and, beyond reporting that it has examined an environmental assessment document, what should a review body be authorized to decide or recommend? Even more fundamentally, those responsible for assessment procedures have been forced to consider the status of the assessment itself. That is, were such procedures merely desirable, or was environmental assessment and some of its component parts, such as hearings and public involvement, in fact formally required by law? What are the implications, if any, for a proposed activity when a required environmental assessment was not conducted, was marred by some real or alleged deficiencies, or was left uncompleted? Developments on various fronts relating to these design criteria contributed to the reform processes which are outlined at the end of the section.

1. *The Applicability of Assessment*

Whether environmental assessment procedures — once established — are even applicable to a particular activity or decision is a threshold question. Various formulae have been used to separate initiatives that must undergo assessment from those which are not subject to the requirements of environmental assessment. Schemes have distinguished between private initiatives and the activities of public agencies. In addition, smaller and localized initiatives, or initiatives under some pre-determined expenditure ceiling have been excluded in some regimes. Efforts to distinguish activities with immediate, direct or conventionally recognized environmental consequences from more preliminary activities whose environmental impacts, if any, have generally been presumed to be too remote or intangible to assess have also been made.

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254 P. Emond, *Environmental Law and Policy: A Retrospective Examination of the Canadian Experience* in I. Bernier & A. Lajoie, eds., CONSUMER PROTECTION, ENVIRONMENTAL LAW, AND CORPORATE POWER (Ottawa: Supply & Services Canada, 1985) 89 at 125-26.

The frustration levels of those responsible for determining the applicability of environmental assessment legislation have been extremely high. Thus, Harry Poch described it as a "recurring headache" for legal advisors dealing with Ontario's legislation to ascertain whether any particular initiative "is included in those undertakings subject to the Act, and if so, whether it is also included in the exemptions, exceptions from the exemptions, or exclusions from the exceptions."[255]

In the federal context, the question of the applicability of the Guidelines Order to the Governor in Council was addressed in the Innu litigation where the court found that the exercise of prerogative or treaty-making authority would not require adherence to the Guidelines Order.[256] Again, in *Angus*, MacGuigan J.A. concluded for the majority of the FCA that compliance was not required in the case of an Order in Council made under the authority of the *National Transportation Act*[257] to reduce Via Rail passenger services on the grounds that Cabinet was not a "department, board or agency of the government of Canada" within the meaning of the Guidelines Order.[258] However, La Forest J.'s sympathetic discussion in *Oldman* of the dissenting analysis in *Angus* invited reconsideration of the question of the Guidelines Order applicability to Orders in Council.[259]

Several provinces, notably those in western Canada, made early provision for environmental assessment of private sector development. The application of the Ontario *EAA* to private sector initiatives was contemplated in policy deliberations prior to the introduction of legislation in 1975 and the suggestion has repeatedly been made that environmental assessment should apply on a comprehensive basis to encompass both the public and private sectors.[260] The *Royal Commission on the Northern Environment*, for example, so argued in its Final Report.[261]

The arguments were summarized by Robert Gibson and Beth Savan, who suggested that there is "no environmental justification for distinguishing between public and private proponency in decisions about application of the Act".[262] As a result of the general exclusion of private

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[255] H. Poch, CORPORATE AND MUNICIPAL ENVIRONMENTAL LAW (Toronto: Carswell, 1989) at 311. As the author explains, the "problem is compounded by the fact that these categories are in a relatively constant state of flux....and by the fact that different aspects or stages of any particular undertaking may be included in different categories in the regulations or as part of a class environmental assessment process."

[256] *Naskapi*, *supra*, note 243.

[257] R.S.C. 1985 (3d Supp.), c. 28.

[258] *Angus* v. *R.* (1990), 72 D.L.R. (4th) 672 at 685 (*sub nom. Angus* v. *Canada*), [1991] 5 C.E.L.R. (N.S.) 157 at 173 (F.C.A.).

[259] *See Vancouver Island Peace Society* v. *Canada*, [1992] 3 F.C. 42 (T.D.) [hereinafter *Vancouver Island*].

[260] Section 3(b) of the *Environmental Assessment Act* R.S.O. 1990, c. E–18 [hereinafter *EAA*] provides for the Act to apply to major commercial undertakings upon a date proclaimed by the Lieutenant Governor, but this has yet to occur.

[261] *RCNE Final Report*, *supra*, note 246.

[262] The Canadian Environmental Law Research Foundation, ENVIRONMENTAL ASSESSMENT IN ONTARIO (Ontario Ministry of the Environment, 1986) (Project Directors: R.G. Gibson & B. Savan) at 50.

sector projects, their indirect and cumulative environmental effects are not receiving adequate consideration and difficult problems continue to arise "in the sizable grey area between wholly public and wholly private undertakings".[263] While larger companies frequently undertake environmental reviews of their own accord, the benefits of such assessments are not yet generally experienced by private sector decision-makers and will not be available in the absence of requirements for private sector review which, the analysis concluded, have made valuable contributions in other jurisdictions. Gibson and Savan acknowledged the concern of some corporate proponents that the existing public review provisions of the Ontario Environmental Assessment offered intervenors a "hunting licence", but the authors insisted that "others have seen proceedings under the Act as providing a credible method of certifying private projects as environmentally acceptable."[264]

Incremental steps towards wider scrutiny of private sector development in Ontario were taken in the form of the March 1987 MOE announcement that all major public and private "energy from waste" proposals would be subject to the *EAA*.[265] However, some further reflection has identified a number of possible distinctions between public and private initiatives which may influence the way in which environmental assessment procedures would be applied in each context. Thus, Paul Emond pointed to the absence of powers of expropriation, more restrictive mandates (business for profit) and more constrained options as factors that narrow the range of alternatives which private proponents could reasonably explore in detail. In summary, Emond noted:

> [A] private sector proponent may be faced with "special constraints" that argue in favour of a narrower, more restricted or "scoped" environmental assessment. Thus, the desire to develop a particular piece of property or to locate near or adjacent to a related facility, might tip the scales in favour of a scoped process.[266]

The rationale for distinguishing initiatives at the policy level from apparently more concrete projects and undertakings has also come under close scrutiny and criticism in light of the inertial bureaucratic force that can be generated within large institutions on the basis of preliminary commitment to an idea or framework that assumes the desirability of certain forms of development. The RCNE analysis of regional development and resource use planning in Northern Ontario illustrated this phenomenon in detail.[267] Others pointed to policies affecting intermodal shifts in transportation and even constitutional design as embodying

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[263] *Ibid.* at 51-52.

[264] *Ibid.* at 50-52.

[265] Ontario, Environmental Assessment Board, *Annual Report* (31 March 1989) at 18.

[266] D.P. Emond, *Environmental Assessment and the Private Sector – Part II* (1990) 2:1 ENV. L. ALERT 1 at 2.

[267] *RCNE Final Report, supra*, note 246 at Appendix 14, 47-48.

important environmental consequences which are likely to be overlooked or disregarded in the absence of assessment requirements.

Again, the work of the Brundtland Commission may be credited with popularizing, if not for originating, an awareness of the environmental implications of policy. As argued in the *Brundtland Report* "environmental regulation must move beyond the usual menu of safety regulations, zoning laws, and pollution control enactments; environmental objectives must be built into taxation, prior approval procedures for investment and technology choice, foreign trade incentives, and all components of development policy."[268] As the *Brundtland Report* also argued, central agencies and major sectoral ministries significantly influence "the form, character, and distribution of the impacts of economic activity on the environmental resource base."[269] As the Commission explained, "through their policies and budgets" these institutions "determine whether the environmental resource base is enhanced or degraded and whether the planet will be able to support human and economic growth and change into the next century."[270] This understanding appeared to be gaining ground on the basis of endorsement in the federal *Green Plan*.[271] But with the announcement on the first anniversary of the *Green Plan* that environmental assessment of federal budget and cabinet decisions is now uncertain, progress was arrested. "There's no models that I know of that Canada can borrow from," the Minister remarked. "It requires that we develop the methodology to do it."[272]

2. *The Assessment Process*

"Environment" itself is a variable of crucial importance to the operation of the impact assessment process: "The broader the definition, the wider the scope of an assessment of environmental impacts" noted Judith Hanebury, adding that in the context of Canadian federalism, a broader definition also involves "an increased likelihood of consequent jurisdictional problems."[273] Notwithstanding relatively stable statutory language, understanding of the environment as reflected in judicial decision-making has evolved significantly, thereby raising the level of

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[268] *Brundtland Report*, *supra*, note 48 at 64. *See also* T. Schrecker, "Spending Green: Federal Expenditure Reform and Sustainable Development" in Ontario, Canadian Bar Association, SUSTAINABLE DEVELOPMENT IN CANADA: OPTIONS FOR LAW REFORM (Ottawa, 1990) 103; Rawson Academy of Aquatic Science for the Canadian Environmental Assessment Research Council, *The Integration of Environmental Considerations into Government Policy* by F. Bregha *et al.* (Ottawa: Supply & Services Canada, 1989).

[269] *Brundtland Report*, *ibid.* at 311.

[270] *Ibid.* at 311-12.

[271] *Green Plan*, *supra*, note 91 at 162.

[272] G. York, "Environmental reviews of budgets put off" *The [Toronto] Globe and Mail* (11 December 1991).

[273] J.B. Hanebury, *Environmental Impact Assessment in the Canadian Federal System* (1991) 36 MCGILL L.J. 962 at 968.

performance that may be expected of the review process.[274] Improvements in technical capability and methodology have also altered the operational dimension of the impact assessment process.[275]

Cumulative impacts were rarely a matter which project-oriented environmental assessments sought to address. But with pressure to adopt sustainability as a benchmark, the likelihood of cumulative impacts entering the calculus increased. This is not to suggest that sustainability has become a criterion which can be applied with precision, for as Elder and Ross observe, "sustainable development is a normative, not a technical, concept; this implies that assessments of sustainability must be viewed as politically accountable, rather than merely technical, exercises."[276] Not surprisingly, therefore, a British Columbia proposal to include significant indirect and cumulative impacts in a reformed assessment process was met with objections about methodological limitations and operational responsibility on the part of those who view such impacts as falling more appropriately within the realm of public land use planning.[277]

Whether or not public participation is formally required, some level of public involvement has ordinarily been encouraged in the interests of a better process. If nothing more, public involvement in the planning process can contribute to "minimization of confrontation and delays."[278] Other measures to enhance the credibility, utility and ultimate acceptability of the assessment process have also been identified. Indeed, for the North Simcoe Waste Management Association this was the history of the 1980s.

In a decision which was subsequently reconsidered by Cabinet[279] the Ontario Environmental Assessment Board endorsed the proposition that an environmental assessment might be considered to be a planning process and that it should be systematic in nature. The Board also advanced rather firm views as to why North Simcoe's procedure for site selection fell short, amounting in effect to a "fiasco". Specifically, the proponent was found to have failed to investigate a series of candidate

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[274] *Compare R.* v. *Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 40 C.C.C. (3d) 289 and *Oldman*, *supra*, note 237.

[275] Elder & Ross, *supra*, note 253 at 130; V.W. MacLaren & J.B. Whitney, eds., NEW DIRECTIONS IN ENVIRONMENTAL IMPACT ASSESSMENT IN CANADA (Toronto: Methuen Publications, 1985).

[276] Elder & Ross, *supra*, note 253 at 125.

[277] British Columbia, Ministry of Environment, Lands and Parks, Ministry of Energy, Mines and Petroleum Resources, *Reforming Environmental Assessment in British Columbia: A Legislation Discussion Paper* (1992); British Columbia, Ministry of Environment, Lands and Parks, *Reforming Environmental Assessment in British Columbia: A Report on the Consultation Process* by D. Lovick, M.L.A. (July 1992).

[278] *Re North Simcoe Waste Management Association* (1989), [1991] 5 C.E.L.R. (N.S.) 98 at 110, [1991] 24 O.M.B.R. 129 at 141-42 (Joint Bd: O.M.B., Environmental Assessment Bd) [hereinafter *North Simcoe Waste* (O.J.B.) cited to C.E.L.R.].

[279] *Re North Simcoe Waste Management Association* (1990), [1991] 5 C.E.L.R. (N.S.) 154, [1991] 24 O.M.B.R. 129 (Lieut. Governor in Council).

sites in a uniform manner before settling on a preferred location. Moreover, the proponent's environmental assessment "defies replicability"; that is, it was not clearly established that "a different person could reasonably have come to the same conclusion as the proponent."[280] As the Board explained more fully:

> The proponent has formulated 10 stages in the site selection process which do not logically follow one another. It has unleashed a torrent of detail to describe its selection activities, and would ask the Board to find method in this exercise where none exists....An environmental assessment must not only come to a conclusion as to the suitability of the undertaking but must also demonstrate how the proponent arrived at it.[281]

In the Board's view the Act calls for "a wide-ranging investigation that involves a reasonable and logical application of criteria, so that the final result is consistent with the steps taken along the way."[282] North Simcoe's effort lacked "the basic combination of reasonableness, consistency and systematic approach."[283]

Notwithstanding reservations about quality and consistency, responsibility for the initial preparation of the impact statement has almost universally been assigned to the proponent or initiating department. This is true at the federal level where environmental review under the Guidelines Order has been conducted on the basis of self-assessment by the initiating department up to and including the decision on whether to proceed with a full panel review. By 1990, only thirty-four panel reports

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280 *North Simcoe Waste* (O.J.B.), *supra*, note 278 at 117.
281 *Ibid.*
282 *Ibid.*
283 *Ibid.*

had been completed and published[284], but steps were begun in 1986 to publish information listing initial assessment decisions. This has helped to provide a more comprehensive picture of the way in which environmental considerations have been incorporated into federal decision-making. Nonetheless, and despite the acknowledged strengths of self-assessment, reservations continue to be expressed about the lack of controls on the quality and consistency of these reviews.[285]

Jurisdictions where provision was made for the possible use of some form of supplementary review and scrutiny of the assessment document, including administrative proceedings and public hearings,

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[284] Panel reports published 1980-92 include:

- Eldorado Uranium Refinery, R.M. Corman Park, Saskatchewan, July 1980 (#373).
- Arctic Pilot Project, Northern Component, N.W.T., October 1980 (#234).
- Lower Churchill Hydroelectric Project, December 1980 (#312).
- Norman Wells Oil Field Development and Pipeline, January 1981 (#263).
- Alaska Highway Gas Pipeline Project, Yukon Territory Routing Alternatives, Whitehorse/Ibex Region, July 1981 (#155).
- Banff Highway Project, km 13 to km 27, Alberta, April 1982 (#442).
- CP Rail, Rogers Pass Development, PRELIMINARY REPORT, April 1982 (#463).
- Alaska Highway Gas Pipeline, Technical Hearings, FINAL REPORT, June 1982 (#156).
- CP Rail, Rogers Pass Development, FINAL REPORT, August 1983 (#338).
- CN Rail Twin Tracking Program, Interim Report, September 1983 (#217).
- Venture Development Project, December 1983 (#469).
- Beaufort Sea Hydrocarbon Production and Transportation, July 1984 (#473).
- Port of Quebec Expansion Project, September 1984.
- CN Rail Twin Tracking Program, Final Report, March 1985 (#486).
- Point Lepreau II, Final Report, May 1985 (#493).
- Hibernia Development Project, December 1985.
- Fraser-Thompson Corridor Review, January 1986 (#525).
- West Coast Offshore Exploration, April 1986.
- Sea Island Fuel Barge Facility, March 1989 (#561).
- The Northumberland Strait Crossing Project, August 1990 (#591).
- Northern Diseased Bison, August 1990 (#592).
- Celgar Expansion Review Panel, Interim Report, December 1990.
- Port Hardy Ferrochromium Review Panel, January 1991.
- Celgar Expansion Review Panel, Final Report, February 1991.
- Oldman River Dam, Interim Report, June 1991 (#614).
- Vancouver International Airport, August 1991 (#618).
- Rafferty-Alameda Project, September 1991 (#619).
- Oldman River Dam, May 1991 (#627E).
- MacArthur River, January 1993.

(These are available from the publications department of the Federal Environmental Assessment Review Office, Hull, Quebec.)

[285] T. Schrecker, *The Canadian Environmental Assessment Act: Tremulous Step Forward, or Retreat into Smoke and Mirrors?* (1991) 5 C.E.L.R. (N.S.) 192 at 218-19; Hanebury, *supra*, note 273 at 970-72.

experienced litigation directed at the status of these procedures. In particular, several attempts were made to require such procedures, rather than to leave decisions about their use to the discretion of officials.[286]

Critics of the Nova Scotia Power Corporation's Point Aconi project were unsuccessful in their efforts to compel public panel review of the proposal.[287] With reference to section 13 of the Guidelines Order, applicants asserted that the level and nature of public concern about the Point Aconi project was such that public review was desirable and that the Minister of Fisheries and Oceans (representing the initiating department in the proceedings) had rejected panel review on the basis of irrelevant considerations. Efforts to compel reconsideration of the assessment process for road development in Ontario's Temagami district or to "bump-up" the assessment to a public hearing process similarly failed.[288] Despite insistence that basic environmental assessments be undertaken where required, courts have been disinclined to scrutinize official judgements of those assessments with a high degree of intensity. In the words of Mr Justice Strayer: "It is not the role of the Court....to become an academy of science to arbitrate conflicting scientific predictions, or to act as a kind of legislative upper chamber to weigh expressions of public concern and determine which ones should be respected."[289]

The contribution of public participation to the environmental assessment process depends not only on the nature of the decision to be made, but upon the actual involvement of the public and the quality of that involvement. Although potential contributions have been recognized in terms of legitimacy, accountability, the importance of different perspectives and quite possibly in terms of new information or more rigorous scrutiny of the proponents' case, the costs of effective participation are frequently substantial. This is particularly so where decisions are dependant on complex evidence and expert witnesses. Litigation concerning the availability of financial support to public interest intervenors in administrative proceedings[290] and a considerable volume of commen-

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[286] C. Prophet, *Public Participation, Executive Discretion and Environmental Assessment: Confused Norms, Uncertain Limits* (1990) 48 U.T. FAC. L. REV. 279 at 292-303.

[287] *Cantwell* v. *Canada (Minister of the Environment)* (1991), 41 F.T.R. 18, [1992] 6 C.E.L.R. (N.S.) 16 (T.D.), *aff'd* (6 June 1991) Doc. No. A-124-91 (F.C.A.).

[288] J. Bradley, "Statement by Jim Bradley, Minister of the Environment Regarding Ministry of Natural Resources' Environmental Assessment for Primary Access Roads", 17 May 1988; Ontario later released suggestions for dealing more systematically with "bump-up" requests, *see* Ontario, Ministry of the Environment, Environmental Assessment Branch, *Guideline on Interim Criteria for Evaluating Exemption, Designation and Bump-Up Requests* (February 1992) (Draft).

[289] *Vancouver Island, supra*, note 259 at 51.

[290] *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23, 19 D.L.R. (4th) 356 (Div. Ct.); *Re Ontario Energy Board* (1985), 51 O.R. (2d) 333, 19 D.L.R. (4th) 753 (Div. Ct.).

tary[291] produced a number of *ad hoc* responses. But Ontario's *Intervenor Funding Project Act*,[292] 1988, represented an attempt to deal more systematically with intervenor finances, albeit on an experimental basis, in relation to the proceedings of a small group of designated tribunals. The statute, whose operation was recently extended to 1996, sets out conditions and criteria for pre-hearing funding applications.[293]

3. *Outcomes*

From an affirmatory perspective, environmental assessment constitutes an essentially technical exercise to be carried out in the course of ongoing project development, but it is largely irrelevant to the basic decision about proceeding to completion. On the other hand, those who view environmental assessment as a pre-condition to development more readily accept that an assessment might lead to a significant transformation of the project or even to termination. These perspectives clashed repeatedly in the 1980s over the specific issue of how far work on a proposal or project should be allowed to proceed prior to the completion of environmental assessment.

In the *Canadian Wildlife Federation* litigation, counsel for the Minister of the Environment urged the court to excuse non-compliance with the Guidelines Order should any be established. However, Muldoon J. took the view that: "If there be anyone who ought scrupulously to conform to the official duties which the law casts upon him or her in the role of a high State official it is a Minister of the Crown".[294] He further observed that with construction of the Rafferty and Alameda works very far advanced "there is little doubt that irrevocable decisions have long since been taken while the *EARP Guidelines* have been circumvented."[295] But neither the CWF situation, nor the circumstances in *Oldman* induced the Federal Court to halt construction pending completion of a review, once a panel had been established.

Putting the case harshly, Marie-Ann Bowden remarked that "it would appear proponents need only advance their proposals irrevocably beyond the planning stages to ensure that the environmental assessment

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[291] K.G. Englehart & M.J. Trebilcock, *Public Participation in the Regulatory Process: The Issue of Funding, Working Paper No. 17* (Economic Council of Canada, February 1981); R. Anand & I.G. Scott, *Financing Public Participation in Environmental Decision Making* (1982) 60 CAN. BAR REV. 81.

[292] R.S.O. 1990, c. I-13.

[293] J.F. Castrilli, *Intervenor Funding - Intervenor Funding Project Act* (Address to the Fourth Annual Environmental Assessment and Environmental Assessment Board Seminar, 6 March 1992) Tab VIII; for discussion of experience under the *Intervenor Funding Project Act* (*IFPA*) and of alternative funding arrangements in other jurisdictions, *see* W.A. Bogart & M. Valiante, *Access and Impact: An Evaluation of the Intervenor Funding Project Act, 1988, A Report to the Ontario Ministries of the Attorney General, Energy and Environment* (February 1992).

[294] *Canadian Wildlife Federation Inc.* v. *Canada (Minister of the Environment)* (1989), [1990] 4 C.E.L.R. (N.S.) 201 at 225, [1990] 31 F.T.R. 1 at 15 (T.D.).

[295] *Ibid.*

process will be an academic exercise."[296] Courts themselves, in the parlance of the decade, tended to put a more positive 'spin' on the position. Thus, when Madame Justice Reed found nothing in the language of the Guidelines Order to support a duty to halt a project pending completion of a review, she insisted that for environmentalists all is not lost:

> Under the scheme of the *Order* it is the watchful eye of public opinion which is to operate as the leverage to ensure that environmentally responsible decisions are taken....any obligation not to proceed while the project is under review also depends for 'enforcement' on the pressure of public opinion and the adverse publicity which will attach to a contrary course of action.[297]

The authority of review panels or assessment boards to require modifications to projects or to offer conditional approvals subject to continuing monitoring also has implications for project development. In some jurisdictions, environmental assessment boards explored and refined their approach to conditions of approval and required modifications.[298]

D. *Pressures for Legislative Reform*

It has been suggested that the EARP litigation, notably the Rafferty-Alameda proceedings, "generated shockwaves within the federal bureaucracy" and that the cases "accelerated the pace of and gave a sense of urgency to reform already underway."[299] As clearly indicated, many proposals for change were already in circulation.

Canadian environmental assessment procedures received very extensive consideration by commentators and participants alike at both the federal and provincial levels. Federally, numerous studies have been done on various aspects of the EARP operations. In 1988, a study group recommended to FEARO a series of modest changes to the informal procedures then in place for public reviews.[300] The Minister of the Environment also initiated a consultation process on EARP reform with the publication of a Green Paper.[301] Under the banner of sustainability,

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[296] M.A. Bowden, *Damning the Opposition: EARP in the Federal Court*, [1990] 4 C.E.L.R. (N.S.) 227 at 235-36.

[297] *Naskapi*, *supra*, note 243 at 403-04; cited with approval in *Canadian Wildlife Federation Inc.* v. *Canada (Minister of the Environment)*, *supra*, note 243 at 665-66.

[298] M.I. Jeffery, *Consideration and Analysis of Conditions of Approval Likely to be Imposed by the Environmental Assessment Board in Granting Project Approval* (1987-88) 1 CAN. J. OF ADMIN. L. & PRACTICE 21.

[299] Jeffery, *supra*, note 222 at 1073.

[300] Study Group on Environmental Assessment Hearing Procedures, *Public Review: Neither Judicial, nor Political, but an Essential Forum for the Future of the Environment* (Ottawa: Minister of Supply & Services Canada, 1988). The study group was chaired by the Honourable Allison A.M. Walsh QC, formerly of the Federal Court, and included Dr. W.A. Ross and Maître Michel Yergeau.

[301] *Reforming Federal Environmental Assessment* (Discussion Paper) (Ottawa: Minister of Supply & Services Canada, 1987).

practitioners and other observers contributed to the deliberations.[302] Those whose proposals were subject to review and those who served as panel members took part in the formulation of recommendations for reform.

Organizations required to undergo environmental assessment had often criticized the processes for delay, cost, interjurisdictional and interagency overlap as well as inconclusiveness. In Ontario, more general concerns were expressed about the extent to which the requirements governing environmental and planning approvals operate as a major impediment to economic development. The key document in the critique, *Reforming Our Land Use and Development System*, was formulated in 1988-89 by an interministerial advisory group from which Environment Ministry officials had conveniently been excluded. Beginning from the assumption that "population and economic growth must be accepted as inevitable and desirable", the authors sought to establish clear priorities for the regulatory system:

> Ideally the regulatory process recognizes the desirability and inevitability of growth, as do other elements of public policy, and is conducted in a way that minimizes costs and growth bottlenecks. However, if the process becomes a means of impeding growth by increasing its cost and complexity, it has failed in achieving its central purpose and requires fundamental reform.[303]

The document advocated a series of principles and procedures which were so much at odds with the values underlying environmentalism that one senior journalist suggested it had the trademarks of a hoax, for "[n]o responsible provincial government official in 1989 could seriously propose a policy tantamount to declaring war on the environmental protection movement."[304] Project X, however, as the initiative was sometimes known, succeeded in giving prominence to "regulatory gridlock" as a challenge to be addressed.

For their part, veteran review panel members occasionally articulated their concerns about the status and impact of panel proceedings. At the conclusion of the examination of the Alberta-Pacific pulp mill

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[302] R. Cotton & G. Bell, *Principles of Environmental Assessment at the Federal Level* in SUSTAINABLE DEVELOPMENT IN CANADA: OPTIONS FOR LAW REFORM (Ottawa: Canadian Bar Association, 1990) 72.

[303] *Reforming Our land Use and Development System* (August, 1989) [unpublished].

[304] M. Valpy, "Land-use document cause for concern" *The [Toronto] Globe and Mail* (14 September 1989) A8.

proposal, for example, members of the joint Alberta-Canada review board recommended a series of changes to the EIA review process.[305]

E. *Reform Initiatives*

1. *British Columbia*

Several fundamental challenges underlie British Columbia's recently announced intention to reform environmental assessment. Existing assessment streams are to be consolidated and given secure legislative foundations, but the exercise is also to be carried out in a manner that produces effective co-ordination of environmental assessment with both land use planning and integrated resources management. In addition, the focus of environmental assessment is to be re-directed from on-site and project specific impacts to a broader analysis incorporating sustainability, biodiversity, transboundary and global considerations and distributive concerns. From the perspective of process, the province has also expressed a determination to ensure efficiency and consistency in assessment and to strengthen opportunities for both public participation and co-operation with other decision-making authorities.[306]

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[305] The Alberta-Pacific Environmental Impact Assessment Review Board, *The Proposed Alberta-Pacific Pulp Mill: Report of the EIA Review Board* (Edmonton: Alberta Environment Publications Centre, 1990) at 93. The panel recommended that:

"– any preliminary government approval should be limited to approval to proceed to regulatory review;
– all major proposals should be reviewed at public hearings;
– the public review should be by an independent review panel of an appropriate size and makeup;
– the review panel should look at all aspects of a proposal, including social and economic impacts and the technology, as well as impacts on the environment;
– the scope of an EIA should be determined at public meetings early in the process;
– those directly and substantially affected by the proposed project should be involved in the preparation of the EIA;
– adequate time should be provided throughout the process;
– projects should not be separated into different components for review purposes;
– an ecosystem approach should be used in dealing with environmental matters;
– if two or more jurisdictions are involved, serious efforts should be made to combine the public reviews;
– reasonable funding should be available early in the process;
– the number of hearing locations should not be too great; and
– plans should be made to provide administrative, technical and other assistance to future review panels."

[306] British Columbia, Ministry of the Environment, Lands and Parks, *Reforming Environmental Assessment in British Columbia: A Legislation Discussion Paper.*

2. *Alberta*

For purposes of environmental assessment and approvals, Alberta historically distinguished between energy-related projects under the jurisdiction of the Energy Resources Conservation Board, and non-energy projects which were reviewable under certain circumstances pursuant to the *Land Surface Conservation and Reclamation Act*[307] of 1973. Although limitations in the latter arrangements were the subject of critical commentary from time to time,[308] the general importance and urgency of reform were not fully appreciated until the time of the Alberta Pacific proposal. Working over the winter of 1989-90, an Alberta Task Force formulated recommendations to replace the province's flexible and informal assessment process with a legislatively-based regime embodying a minimum of discretion.

The Task Force recommendations emphasized the creation of policies to promote sustainable development, the availability of information and the collection of baseline data, public involvement, and the importance of minimizing jurisdictional problems and delays.[309] Legislative attention to these themes is apparent in the new *Natural Resources Conservation Board Act* and the province's *Environmental Enhancement and Protection Act*, although practitioners expressed apprehension about potential deficiencies in the operation of the administrative approvals structures that have been created.[310]

3. *Saskatchewan*

In 1990, Saskatchewan embarked upon a re-assessment of the environmental assessment legislation adopted ten years earlier,[311] and established the Saskatchewan Environmental Assessment Review Commission (SEARC) for this purpose. Data relating to 636 proposals considered by the Saskatchewan Department of Environment and Public Safety indicated that full environmental impact assessment was required for 80 (13%), although only 35 EIAs were actually completed and only one Board of Inquiry (Rafferty/Alameda) was established during the eleven year period of operations. Only two of the 636 proposals failed to obtain approval to proceed. "It is clear", concluded an analysis by

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[307] S.A. 1973, c. 34.

[308] P.S. Elder, *Environmental Impact Assessment in Alberta* (1985) 23 ALTA L. REV. 286; for discussion of the history of the ERCB with emphasis on the evolution of its environmental mandate and operations, *see* F.M. Saville & R.A. Neufeld, *The Energy Resources Conservation Board of Alberta and Environmental Protection* (1989) 2 CAN. J. ADMIN. L. & P. 287.

[309] *Report and Recommendations of the Alberta Environmental Impact Assessment Task Force* (Edmonton, 1990).

[310] *Environmental Enhancement and Protection Act, supra*, note 195; *Natural Resources Conservation Board Act*, S.A. 1990, c. N-5.5; F.M. Saville & R.A. Neufeld, *Project Approvals under Proposed Alberta Environmental Legislation* (1991) 4 C.J.A.L.P. 275.

[311] *The Environmental Assessment Act*, S.S. 1979-1980, c. E-10.1.

SEARC, that "the existing Environmental Assessment process has not been a major roadblock for those proposals it has affected."[312]

Reform proposals advanced by SEARC in 1991 emphasized a more comprehensive and independent process of assessment than current legislation provides. In addition to recommendations for the creation of an Environmental Assessment Commission, SEARC outlined a series of mechanisms to ensure that environmental considerations would be more systematically addressed at all stages of development: framework policy-making, site-specific decision-making, project monitoring and decommissioning.

4. *Ontario*

In Ontario, various aspects of the environmental assessment process have been under review in one forum or another throughout the past decade. Formal procedural standards and other modifications to hearings were adopted by regulation[313] or in the context of specific proceedings such as the Timber Management Class Environmental Assessment.[314] The question of scoping received particular attention in response to concerns regarding the length of Environmental Assessment Board hearings. As the Board itself acknowledged in a discussion paper, attempts at streamlining by individual panels "have met with varying levels of acceptance and success."[315]

A comprehensive review of *Environmental Assessment in Ontario*, directed by Robert Gibson and Beth Savan for the CELRF, helped to encourage a reform initiative known as the Environmental Assessment Program Improvement Project (EAPIP).[316] EAPIP became the Environmental Assessment Task Force and has been concerned with the issues of applicability, the role of planning and consultation in the process, public notice and participation, and mechanisms to expedite decision-making.[317]

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[312] *Environmental Challenges: The Report of the Saskatchewan Environmental Assessment Review Commission* (Regina: Saskatchewan Environment and Public Safety, 1991) at 69-81.

[313] Environmental Assessment Board, *Rules of Practice and Procedure*, O. Reg. 4/88.

[314] For a review of procedural initiatives by the Ontario Environmental Assessment Board and the Joint Board, *see* M.I. Jeffery, *Environmental Approvals in Canada: Practice and Procedure*, (Toronto: Butterworths, 1989) paragraphs 6.66 to 6.95. Procedural rulings from the Timber Management Class Environmental Assessment include decisions on qualifying expert witnesses; agreed statements of fact; limitations on oral presentation of evidence-in-chief; scoping witness statements and interrogatories; draft terms and conditions; phasing of evidence; and counsel's freedom of expression.

[315] *The Hearing Process: Discussion Papers on Procedural and Legislative Change* (Toronto: Ontario Environmental Assessment Board, September 1990) 1.

[316] ENVIRONMENTAL APPROVALS IN CANADA, *supra*, note 77, paragraphs 6.43 to 6.65.

[317] Ontario, *Environmental Assessment Board* (Toronto: Ontario Environmental Assessment Board, 1990) at 18 (Chair: Grace Patterson).

The reform process advanced through several phases with procedural adjustments giving way to discussion of structural changes involving the relationship of environmental assessment to other institutional requirements, including specific approvals and planning. More recently, particularly in the aftermath of the *Brundtland Report*, attention in Ontario has been directed towards conceptual issues, notably the relationships between planning processes and overall policy.

In response to sustainability, the Chair of the Ontario Environmental Assessment Board, like her counterparts in other jurisdictions, emphasized the linkage between framework policies which have rarely been questioned in environmental terms and direct impacts on the conduct of planning and project development:

> I think we all recognize that economic policies, for example, which appear on their face to involve matters which do not fit within the narrow or normally understood definition of environment, have the most profound consequences for sustainable development....policy development often has much more significance than project assessment. As with planning decisions, which create long-term incremental effects, policies which dictate how particular areas of activity will be handled in the future create long-lasting environmental effects.[318]

Yet Ontario decision-makers have so far been no more successful than others in articulating or implementing workable responses to these newly-acknowledged considerations.

5. *Canada*

Ministerial announcements and the April 1989 Throne Speech confirmed the federal government's intention to place strengthened environmental assessment provisions on a legislative basis. An Act to establish a federal environmental assessment process was introduced to the House of Commons in June 1990 as Bill C-78, subsequently reintroduced as Bill C-13 and, following extensive amendment in committee, it was finally assented to in June 1992.[319]

The *CEEA*, upon proclamation, will formalize the federal government's environmental assessment responsibilities for projects carried out, financially assisted, or licensed under federal authority, or involving the use of federal lands. An extensive consultation process is underway to determine more precisely by means of regulation which projects will automatically require comprehensive study rather than a more limited initial screening. Certain projects, including emergency

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[318] G.M. Patterson, *The Ontario Environmental Assessment Process*, Article V in ENVIRONMENTAL REGULATION: TODAY AND TOMORROW (Mississauga: Insight Press, 1991) 30-32; *see also*, P. Jacobs & B. Sadler, eds., SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL ASSESSMENT: PERSPECTIVES ON PLANNING FOR A COMMON FUTURE (Hull: Canadian Environmental Assessment Research Council, 1990).

[319] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 [hereinafter *CEAA*].

work, and others designated by regulation may also be excluded from the assessment process. The *CEEA* continues to provide for public review panels in specified circumstances, and adds mediation as an alternative procedure. Follow-up and performance monitoring mechanisms have also been introduced.

Subject to negotiations with other responsible decision-makers including the provinces and native authorities, it is hoped that agreements may be reached to harmonize environmental assessments and to reduce the risks of administrative duplication and inconsistency.

F. *The Lingering Issues*

1. *Intergovernmental Relationships*

Environment, the Supreme Court of Canada observed in *Oldman*, is "a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty."[320] Public sparring between federal and provincial environment ministers prior to the passage of Bill C-13, confirmed that the intergovernmental dimensions of environmental assessment persisted as major irritants in the relationship; this is particularly so in the context of provincially-endorsed resource developments.[321]

Judith Hanebury has suggested that the issue of federal jurisdiction for environmental assessment may be considered from two inter-related perspectives: "First is the question of the kinds of proposals that will be covered by the federal process....The second jurisdictional question to be considered is whether all aspects of a proposal will be assessed or only those that fall directly within federal jurisdiction."[322] The Supreme Court of Canada decision in *Oldman* addressed both questions.

With regard to the first issue, the Court held that federal authority to conduct an environmental assessment is not limited to federal projects or to proposals involving federal lands or financing, but may be authorized in connection with the exercise of federal decision-making responsibility, typically involving "an affirmative regulatory duty pursuant to an Act of Parliament."[323] With respect to the second issue, the court adopted a broad understanding of environment as encompassing more than the biophysical environment, and indicated accordingly, that consideration of social and community impacts may be undertaken in the course of an environmental assessment founded on federal responsibility.

The practice of using joint federal-provincial reviews increased dramatically in 1989-90 as a means to manage the challenges of dupli-

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320 *Oldman*, *supra*, note 237 at 238.
321 *See* Lucas, *supra*, note 33; Walters, *supra*, note 33.
322 Hanebury, *supra*, note 273 at 966.
323 *Oldman*, *supra*, note 237 at 225.

cation, conflict and possible inconsistencies.[324] The future legislative basis for joint assessments is now changing rapidly in several provinces and at the federal level,[325] where international transboundary effects are expected to receive more systematic consideration on the basis of international agreement.[326] Although the principle of interjurisdictional coordination has been more generally accepted, the mechanics remain elusive.

2. *Planning and Environmental Assessment*

Analysts have identified several motivations for impact assessment, including projects proposed for specific sites, the selection of the preferred site for a project with several possible routes or locations, and the choice of alternative futures for a specific area. The last of these most closely resembles the task assumed by planners when faced with a range of alternative development strategies for a given region or community. If impact assessment in the first two contexts may be regarded as essentially a reaction to a proposed undertaking or activity, in the latter context, it offers the prospect of being "a positive program of considered planning leading to proposals based on environmental capability."[327]

Reactive assessments have dominated past practice, but the severity of cumulative impacts and the gradual infusion of sustainability into the perspective of public decision-makers have strengthened the desire to capture the anticipatory or proactive dimension. This objective figures prominently in recent analysis of environmental assessment reform. In British Columbia, for example, reform proposals acknowledged that "project-specific reviews often provide the only opportunity for the public to raise basic land allocation or planning issues",[328] with the result that review processes have been stalled. The province's new Commission on Resources and Environment now has responsibility for the formulation of comprehensive land use strategies.[329] In Ontario as well, difficulties in the relationship between land-use decisions and environmental assessment have been identified, and action to provide more effective integration, ideally by introducing a greater degree of environmental sensitivity into land-use allocation, has been initiated.[330] In late

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[324] M. Ross, *An Evaluation of Joint Environmental Impact Assessments* in M. Ross & J.O. Saunders, eds., *supra*, note 239, 322.

[325] *The Environment Amendment Act*, S.M. 1990-91, c. 15, amending the S.M. 1987-88, c. 26, s. 13.1.

[326] *CEAA*, *supra*, note 319, ss. 46 & 47; Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991.

[327] T. Meredith, *Environmental Impact Assessment and Monitoring* in B. Mitchell, ed., RESOURCE MANAGEMENT AND DEVELOPMENT: ADDRESSING CONFLICT AND UNCERTAINTY (Toronto: Oxford University Press, 1991) 224 at 235-36.

[328] British Columbia Ministry of Environment, Lands and Parks, *Reforming Enviromental Assessment in British Columbia: A Legislation Discussion Paper* at 9.

[329] *See also*, *supra*, note 312 at 60-61.

[330] R. Gibson, *Responding to Land-Use and Environmental Conflict: Environmental Assessment and Land-use Planning in Southern Ontario*, in M. Ross & J.O. Saunders, eds., *supra*, note 239, 304.

1992, the Commission on Planning and Development Reform formulated draft recommendations for discussion. The proposals offered some opportunities for expediting development approvals by reducing provincial involvement while increasing the level of general guidance provided to municipalities through provincial policy statements, on matters such as conservation, agricultural lands, and natural heritage and ecosystem protection.[331]

3. *Aboriginal Interests and Environmental Assessment*

During the 1980s, many relatively isolated native communities experienced renewed developmental pressures, particularly in the form of energy and resource projects in their traditional homelands and the environmental assessment process provided one avenue of response. On the one hand, native communities endeavoured to confirm the applicability of the environmental assessment process, and attempted to ensure compliance with established procedures and other obligations. In addition, there have been a number of initiatives dealing with the adaptation and refinement of environmental assessment to accommodate the distinctive features of aboriginal environmental concerns and native decision-making.[332] In general these initiatives have been intended to ensure better participation for native interests in environmental decision-making, even if the prospect of fully recognizing or integrating diverse perspectives seems remote.[333]

In reviewing the triggering process for the federal Guidelines Order in the aftermath of *Oldman*, one commentator concluded that "the Crown's general fiduciary duties to Aboriginal Peoples in so far as they are non-statutory and non-regulatory in nature are insufficient to trigger application of the Guidelines Order."[334] The *CEAA* now provides a framework to deal more explicitly with environmental assessment in the context of native lands, whether administered under the *Indian Act* or involving bodies established pursuant to land claims agreements.[335]

Innovative institutions with responsibility for environmental assessment have already emerged in the context of comprehensive aboriginal claims agreements and from other negotiations. In general, these are joint management structures involving native and non-native participants in stages of decision-making ranging from initial screening and recommendations through to final authority.

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331 Ontario, *Draft Report on Planning and Development Reform in Ontario* (Toronto: Queen's Printer, 1992) (Commissioner J. Sewell) [hereinafter *Draft Report*].

332 W.A. Bogart & M. Valiante, propose separate investigation of natives and funding related to IPFA in *Access and Impact: An Evaluation of the Intervenor Funding Project Act, 1988*, A Report to the Ontario Ministries of the Attorney General, Energy and Environment (February 1992).

333 P.J. Usher, "Indigenous Management Systems and the Conservation of Wildlife in the Canadian North", 14:1 *Alternatives* (1988) 3.

334 J. de Pencier, *supra*, note 237 at 305.

335 *CEAA*, *supra*, note 319, ss. 10, 40 & 48.

Several of the recently-created and proposed institutions are intended to operate in the northern territories.[336] Of these, the arrangements provided in the *Inuvialuit Final Agreement*[337] for an Environmental Impact Screening Committee and an Environmental Impact Review Board (EIRB) have the longest track record, having already experienced significant jurisdictional controversy in relation to dealings with other approval bodies. In particular, criticisms by the EIRB of Gulf Canada Resources Ltd's proposed "Kulluk Drilling Program" in the Beaufort Sea and friction with COGLA demonstrated the Board's early intentions to approach its mandate with a firm hand.[338]

In anticipation of further advances towards native self-government, several provinces have already proposed or entered into arrangements to co-ordinate decision-making in relation to planning and environmental assessment.[339] Observers writing from a variety of perspectives have remarked on an apparently increased degree of convergence in terms of environmental values between native communities and environmental groups and between environmental groups and corporate interests.[340] To the extent that these insights are correct and in so far as the presumed trend persists, the gap should continue to decrease with the result that institutions will not be expected to accommodate and reconcile opinions extending across such a wide gulf.

The interest in new mechanisms to promote more systematic attention to preventive measures, often with regard to cumulative and unsustainable environmental impacts, as seen in developments related to toxic substances and assessment was also evident in the ways that the environmental responsibility of individuals was emphasized during the 1980s. That topic is the subject of the concluding portion of this survey which will appear in the next issue of this journal.

TO BE CONTINUED

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[336] M.A.K. Muir, *Impact of Aboriginal Claims Agreements on Environmental Review in the Northwest Territories* (1991) 1 J.E.L.P. 283.

[337] *See generally*, J.M. Keeping, THE INUVIALUIT FINAL AGREEMENT (Calgary: Canadian Institute of Resources Law, 1989).

[338] G. Griffiths, "Environmental Review Under the Inuvialuit Final Agreement: The Kulluk Drilling Programme in Jeopardy" 31 *Resources: The Newsletter of the Canadian Institute of Resources Law*, (1990) 1; M. Robinson & L. Binder, *The Inuvialuit Final Agreement and Resource Use Conflicts: Co-Management in the Western Arctic and Final Decisions in Ottawa* in M. Ross & J.O. Saunders, eds., *supra*, note 239, 155.

[339] Ontario, Ministry of Natural Resources, *Planning Agreement Signed by Ontario and First Nations* News Release, 13 February 1992; *Reforming Environmental Assessment in British Columbia*, *supra*, note 306 at 31; *Draft Report*, *supra*, note 331 at 43.

[340] R. Kapashesit & M. Klippenstein, *Aboriginal Group Rights and Environmental Protection* (1990) 36 McGILL L.J. 925; D.P. Emond, *The Greening of Environmental Law* (1991) 36 McGILL L.J. 742.