A BRIEF HISTORY OF ENVIRONMENTAL LAW

Prepared as background information for jounralists

by

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This paper outlines the evolution of environmental law from basic common law rights to comprehensive future planning legislation which can minimize environmental damage.

From the earliest times, people had common law rights to protect themselves and their property from damage. If harm was caused, then the courts could be asked to order the defendant to repair the damage or pay money compensation. If the harm was a continuing one, such as a daily discharge of a noxious substance, then the courts could grant an injunction forbidding the defendant to repeat the behaviour which caused the harm.

Using the early common law remedies presented two problems. Firstly, one usually had the difficult task of proving not only that a defendant had caused the harm but also that he had been negligent; and secondly, if the harm affected the whole community, such as an airborne contaminant might, then no one person was allowed to sue on behalf of all to stop the problem.

The problem of proving negligence was partly solved by the case of Rylands v. Fletcher decided in 1866. In that case, the defendant built a small dam on his property which burst, flooding Mr. Ryland's land. The defendant said that he had not been negligent; he had built the dam carefully and therefore could not be held responsible. The Court, however, rejected his argument and decided that if a person chose to keep a dangerous substances on his property, then he would be liable if the substance escaped and caused damage even if there were no negligence on his part.

The problem of no one person being able to sue was partly solved by the creation of the office of the Attorney General who was empowered to sue to protect the "public interest", and partly by the creation of statutes which made certain polluting activities illegal which meant that persons guilty of such activities were subject to prosecution and fines. In 1895, the federal government passed the Fisheries Act making it illegal to deposit substances in navigable waters which might be deleterious to fish, and the Criminal Code offence of creating a public nuisance could be used in a case where damage occurred to the community at large. By 1900 all jurisdictions had passed public health acts, aimed

at protecting water quality and regulating sewage disposal. The statutes required approval from a Board of Health before any sewage disposal system could be implemented and imposed certain standards of water quality. The acts were administered by municipalities.

Quiet, clean surroundings were values shared by most communities in the 1800's. As a result, anti-noise, anti-littering and anti-nuisance by-laws were passed by many municipalities. By the end of the Second World War, however, industrialization had presented a strong challenge to the earlier values. Industries were courted by governments and many anti-environmental protection statutes were passed to make locating in a particular jurisdiction more attractive. Existing by-laws were either repealed or not enforced. In Ontario for example, the Industrial and Mining Lands Compensation Act allowed mine owners to purchase rights of free passage over others land for gases from mining processes. Once such a right was sold, no subsequent owner of the land could sue for damages even if the kind or quantity of mining emissions changed. The Damages By Fumes Arbitration Act took away the right of citizens affected by fumes to go to Court and substituted a government-appointed arbitrator to hear the cases. Ontario also passed legislation which directed Courts to consider economic conditions as a governing factor when downstream residents sought injunctions to halt damage caused by pulp and paper mill effluent.

By the early 1950's, the conflict between individuals asserting their common law rights and others asserting their statutory rights had created a climate favourable to pollution. There were no incentives to clean up. While the common law could be used to stop public works such as sewage disposal plants the small taxing power of municipalities made it impossible to carry out their public health responsibilities. Provincial governments found it necessary to take over the building and financing of essential public health services. Eventually standards became uniform across each province.

At the same time, scientific articles warned that public health statutes could not protect public health and efforts to clean up pollution created by industrialization were essential if health and property were to be protected. By the 1960's, most jurisdictions had accepted the scientific evidence and had passed statutes aimed at solving specific problems. Statutes such as The Ontario Water Resources Act, The Air Pollution Control Act and The Waste Management Act were all aimed at solving specific pollution problems. Following the considerable publicity given to Rachael Carson's book Silent Spring, many jurisdictions also passed pesticide control acts. By 1970, all Canadian provinces had passed some kind of anti-pollution legislation.

During this period, the federal government also started to exercise its jurisdiction. It strengthened the Fisheries Act and the Canada Shipping Act; and passed regulations limiting pulp and paper mill effluent and oil pollution. In an effort to prevent pollution havens in Canada, the federal government passed The Canada Water Act, The Clean Air Act, The Arctic Waters Pollution Prevention Act and The Northern Inland Waters Act.

All of the post war legislation adopted a case by case approach solving specific problems as they arose. By the end of the 1960's, however, many jurisdictions had concluded that management of the environment would be a better solution. Ministries of Environment were created and given comprehensive environmental protection legislation to administer. Statutes such as the British Columbia Pollution Control Act, The Manitoba Clean Environment Act, The Nova Scotia and Ontario Environmental Protection Acts, The Quebec Environmental Quality Act, The New Brunswick Clean Environment Act, The Newfoundland Environment Act and The Northwest Territories Environmental Protection Ordinance were all statutes which offered comprehensive environmental protection.

The importance of these statutes in the development of environmental law is not their promise of comprehensive protection but their centralization of environmental management in one government ministry. In fact, the promise of comprehensive protection has not been fulfilled, nor has the promise that the legislation would be a citizens' "Environmental Bill of Rights". Firstly, it is more appropriate to call the legislation "stack and sewer" legislation than "environmental protection" legislation because it contains no requirement that projects such as hydro-transmission lines, dams, airports, or nuclear waste disposal sites mitigate the environmental effects of their construction and operation. Secondly, the public is excluded from participation in environmental decision-making and has no right to get information about proposed projects. For example, neighbours of a proposed new industry have no right to be notified that the industry is coming to their area and neighbours of a polluting company have no right to be notified of what a pollution inspector finds when he inspects the site. If the government issues a clean up order instead of a stop order, then the clean up order can be kept secret and neighbours have no chance to object or to ask for stricter standards. The standards for permissible limits of contaminants are written by civil servants who based their decisions on data supplied by the industry they are regulating. The public is only informed after the standards are published and in force.

The legislation of the 1960's could have provided a comprehensive framework for environmental protection if they had been administered properly. None of the statutes, however, considered protecting the future by requiring careful planning of future projects including public scrutiny.

In 1971, the Canadian Environmental Law Association started its campaign for proper future-oriented environmental planning legislation in Ontario. Such legislation, usually called "environmental impact assessment legislation", would require proponents of projects to assess the environmental impact of construction and operation before a project begins. The assessment would then be considered at a public hearing before an independent tribunal which would have the power to refuse the necessary permits if the environmental consequences outweighed the possible benefit. In 1973, the Canadian Bar Association called for environmental impact assessment legislation and for access to information in environmental matters.

Ontario promised to introduce environmental assessment legislation in the 1973 Speech from the Thorne but it was not until July of 1975 that legislation was finally passed. The legislation, The Environmental Assessment Act, came into force in November 1976. While it was a progressive step, it did not offer equal protection to all areas of the province because it applied only to government projects, and not to those undertaken by the private sector.

In 1973, the federal government took an even more tentative step towards future environmental planning. It created a set of internal rules called The Environmental Assessment Review Process whereby federal government projects were assessed by the Department of the Environment for environmental consequences. The public was completely excluded from the process, although occassionally, a public hearing was held. The public had no right to require a hearing, no right to be present at a hearing, no right to call evidence and no right to cross-examine witnesses. For example, in the first EARP case, which considered the Point Lepreau Nuclear Generating Station, the tribunal made its decision based on information supplied after the hearing. Citizens opposing the station had no opportunity to examine the information or to present a reply.

There have been a number of other ad hoc initiatives in the evolution of environmental law during the 1970's. Commissions such as the Solandt Commission, the Royal Commission on Electric Power Planning, and the Inquiry into the Mackenzie Valley Pipeline have all dealt with important environmental questions. Indeed, the Mackenzie

Valley Pipeline Inquiry has set the standard for environmental hearings in the future. Applying its practice of comprehensive consideration of alternatives to other projects with environmental consequences will be the next step in the evolution of environmental law.

While environmental law has evolved from basic common law remedies sought by each individual to comprehensive future oriented planning to minimize environmental harm to the whole community, many problems must be solved if environmental law is to protect community health and wellbeing. Answers are needed to problems of the definition of constitutional jurisdiction between the federal and provincial governments, problems of inter-provincial and international pollution, problems of excessive discretion left to civil servants without public scrutiny and problems presented by statutes which impose penalties and fines so small they are absorbed as a cost of doing business instead of being high enough to provide an incentive to clean up.