

CANADIAN ENVIRONMENTAL DEFENCE FUND

A DEVELOPMENT PROPOSAL

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A DEVELOPMENT PROPOSAL

In communities across Canada, citizen groups are participating in actions to protect their environment. Often, these citizens find the forums available to them to be inadequate or untested, and the costs of involvement very high. As this proposal outlines, there is an urgent need for new initiatives to strengthen the effectiveness of these local protection activities.

The concept presented here, which has been developed by a group of individuals associated with citizen environmental groups for many years, is that of a special fund to encourage significant local actions to protect the environment. The Canadian Environmental Defence Fund will be a very specialized body, designed to assess and support selected cases before the courts or tribunals. As such, it will complement government efforts to enforce environmental legislation, and to encourage meaningful public involvement in decision-making. By assuming some of the risks, and providing a part of necessary funding, CEDF will work with existing citizen groups to ensure that the most important environmental cases receive a full and fair hearing.

The need for such a Fund is clear. Its financial viability however, is less certain. This proposal seeks funding for an initial 6 month period to test the feasibility of CEDF, and if appropriate, to begin the development activities towards its establishment.

THE NEED FOR THE CANADIAN ENVIRONMENTAL DEFENCE FUND

Improved environmental laws passed over the past two decades could do much to protect Canada's environmental quality, but better mechanisms are needed to encourage constructive use of the legal system. As Ontario's former Attorney-General Roy McMurtry stated recently:

"Fair and just laws are of little comfort to a citizen who feels denied reasonable access to the legal processes that should be available to every citizen."

The protection of environmental quality calls for action along a broad front. As the threats to our life-sustaining ecosystem and to human health become ever more apparant, the catalogue of environmental problems grows: acid rain, airborne pollutants, toxic and radioactive wastes, pesticide residues, short-sighted land uses. Our capacity to respond to protect the environment has also grown, but we cannot afford to rule out one of the most potentially powerful tools - citizen access to courts and tribunals.

Unfortunately, access to participate in the enforcement of

environmental laws is restricted. An Ontario Ojibway band whose livelihood along the English Wabigoon River was destroyed by mercury pollution was forced by prohibitive costs to give up a suit for compensation, and to resort instead to a mediation process, now still unresolved after seven years. Residents of Alberta's Gladstone Valley, endeavouring to protect their domestic water supply from the effects of clearcut logging, found themselves financially unable to pursue further legal action after their claim for injunction was overturned on appeal. Community groups in Scarborough, Ontario, faced a legal bill of almost \$70,000 after a brief environmental hearing into disposal plans for asbestos waste near their homes.

Even where excellent environmental legislation exists, its enforcement by governments has been limited by the capabilities and conflicting priorities of the departments involved. Many private cases have been successful, enough to show that direct citizen action can be an effective complement to government efforts. The only test of Ontario's Environmental Assessment Act in the courts, for example, was begun by a successful private prosecution. Private complaints under the federal Fisheries Act have a good record of successful conviction, including a recent Alberta case prompted by the Fort MacKay Indian Band, resulting in an \$8,000

fine against Suncor Inc. Often, however, such private attempts have faltered, or simply never been attempted.

The most significant barrier to effective use of the courts and tribunals is lack of funds. Legal and expert witness fees quickly add up, often to a scale that precludes judicious use of this talent by citizens' groups. In addition, the awarding of the costs of other parties against a small group in the event of losing a case is a serious deterrent. A Nova Scotia landowners group, for example, faced financial ruin with a \$250,000 bill for party costs after an unsuccessful bid to stop chemical spraying close to their land. The herbicide involved, 2,4,5-T, has been banned in the United States, Sweden, and three Canadian provinces, but the judge ruled that the landowners had not proven the spray to be harmful to human health. Only an international outcry persuaded the company involved to settle for a lesser amount, sparing the landowners from bankruptcy.

The David-and-Goliath nature of court proceedings is repeated in the multitude of regulatory and planning hearings which affect the quality of our environment. The proponents, often large corporations or government agencies, can afford to hire lawyers, consultants, and expert witnesses to ensure that their side of the case is presented in the best possible light. Local citizen groups, often the only intervenors representing the

public interest, are usually scrambling for funding simply to present a minimal response, and the resulting disparity in finances and expertise seriously undermines the effectiveness of such public forums.

A few regulatory bodies, recognizing these difficulties, have begun to provide intervenor funding, but that practice is far from universal. The Alberta Energy Resources Conservation Board recently ruled that two provincial-level conservation groups could not qualify for intervenor funding, since they represented a broader public interest rather than local landowners.

HOW WOULD THE CANADIAN ENVIRONMENTAL DEFENCE FUND HELP?

CEDF is designed to help overcome the most serious obstacle to broader citizen participation, by providing funding to assist significant legal actions. At least initially, CEDF would not undertake cases on its own, but rather would work to strengthen the funding base for existing groups. By a careful review and selection process of cases across the country, it would also help to encourage use of the courts in the most effective ways. The existence of such a Fund would have several benefits:

I) Funding assistance by CEDF would help ensure that the most significant environmental cases, such as those establishing an important precedent, are well-represented and followed through appeal procedures when necessary.

II) Through selection of special cases, CEDF could encourage use of the courts and tribunals in innovative ways to better secure legal rights relating to the environment and human health.

III) By assuming responsibility for party costs in specific cases, CEDF could encourage local groups to

proceed with cases that might otherwise carry unacceptable levels of risk.

IV) By working with existing citizen groups, and requiring that a major part of the legal costs be raised by those groups for each case, CEDF would act as a catalyst to encourage local actions. Insisting on local fund-raising would also act as a deterrent to irresponsible or poorly-planned legal actions.

V) More effective citizen use of the courts would have the desirable longer-term effect of encouraging greater government enforcement of environmental laws as well. CEDF would also encourage greater public funding of intervenor costs as the benefits of effective citizen participation became apparent.

VI) By acting as a well-informed intermediary to channel funds into the most significant environmental cases, CEDF would also provide an opportunity for donors to ensure that their funds are being used in a productive way with direct results.

HOW WOULD THE FUND BE ADMINISTERED?

CEDF will operate as an incorporated, registered charity, independent of any other legal or environmental group. It will be governed by a small Board of Directors, with the assistance of an advisory committee appointed to represent a cross-section of Canada's environmental, legal, and scientific community. Honourary Directors will also be appointed, including well-known Canadians who wish to support the aims of CEDF.

Grants and/or a commitment to cover costs awarded against a citizens group will be based on a well-defined set of criteria, relating especially to the national or regional significance of the case. Groups seeking funding will be required to provide sufficient information to allow a thorough assessment of their proposed case. These applications will be reviewed by CEDF advisors familiar with that region as well as those involved in that area of science or law.

Funding for CEDF will be derived primarily from Foundations and from the general public. The accumulation of a substantial Investment Fund would allow each year's income to be used to support individual cases, and as a back-up in case of the awarding of large adverse costs on a CEDF-sponsored case.

Initial staff requirements of CEDF would be minimal, consisting only of an Executive Director to coordinate review of applications and fundraising activities. As the resources of the CEDF Investment Fund matured, staff requirements would drop to a minimal level, although occasional research assistance could be necessary from time to time.

IMMEDIATE NEEDS FOR DEVELOPMENT

CEDF has now been incorporated, and application for charitable status is underway. At the same time, efforts are being initiated to identify interested individuals and sources of financing to develop the potential of the organization. Three activities are priorities:

- I) To enlist well-respected Canadians to serve as volunteers on the CEDF Board of Directors, Honourary Directors, and Advisory Committee;
- II) To tap the funding potential of alternate sources, including Foundations, individual donors, and direct mail, towards financial self-sufficiency;
- III) To develop criteria and administrative procedures to direct CEDF funds most effectively.

To carry out these activities, a short-term budget for a 6 month period has been established:

Executive Director	\$12,000
Part-time secretarial support	2,000
Travel costs	1,000
Direct mailing testing costs	<u>5,000</u>
	\$20,000

We are convinced that the Canadian Environmental Defence Fund, once established, will play an important and timely role in Canadian society. Its ultimate success, however, depends upon the provision of the short-term funding outlined above which will provide a spring-board to successful implementation of the Fund.

We would be pleased to meet with prospective fundors to discuss the proposed objections and operations of the Fund in more detail.

CANADIAN ENVIRONMENTAL DEFENCE FUND:

INITIAL BOARD OF DIRECTORS

Roger Cotton
Barrister and Solicitor
McCarthy and McCarthy

Robert Fishlock
Barrister and Solicitor

Adele Hurley
Executive Co-ordinator
Canadian Coalition on Acid Rain

Doug Macdonald
Executive Director
Canadian Environmental Law Research Foundation

Sarah Miller
Co-ordinator
Canadian Environmental Law Association

Grace Patterson
Clinic Director
Canadian Environmental Law Association

John Swaigen
Legal Services Branch
Ministry of the Environment, Ontario

Interim staff:

Ron Reid
Development Co-ordinator